Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term , 1996

JOSEPH H. DELANEY,

Petitioner

v.

CHRISTINE RODRIGUEZ,

Respondent

On Petition For The Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1) Can a jury which for any reason whatsoever has not seen and deliberated upon 100 % of the evidence duly admitted ever be the rational trier of fact contemplated by Amendments 6 and 14 of the U.S. Constitution and satisfy the test this court announced in Jackson v. Virginia?

2) If a state, by statute and by judicial construction defines and enumerates the elements of offenses it may prosecute, does this create a federally protected constitutional right under Amendment 14 of the U.S. Constitution which the state is obligated to apply equally to all persons so accused?

3) Does a defendant who exercises his right to discovery under state law elect between the right to due process and his right to speedy trial and thereby waive the latter when there is delay occasioned solely by the prosecution's refusal to obey discovery orders and the trial judge's failure to enforce these orders?

4) Does a defendant have a constitutional right, as a part of due process, to adequate police investigation, collection and preservation of evidence, of access to the accusatory process, to an honest prosecutor, and to a trial presided over by an honest judge?

5) When a U.S. District Judge enters an order which recites he grants leave to a party to appeal his judgment pursuant to Fed.R App. Proc. 22(b), but who thereafter issues no formal certificate must the appellate court then hear the appeal upon its merits?

PARTIES TO THE PROCEEDING

The Parties to the proceeding below were Petitioner, Joseph H. Delaney, and Respondent, Christine Rodriguez., Brewster County Adult Probation Officer. The same parties are before this Court.

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(1)

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(2)

This Court should correct the misperception of the court of appeals that different treatment by a state of individuals within the same category or class under identical factual circumstances does not violate the equal protection clause and is not a federal constitutional violation conferring habeas corpus jurisdiction on a federal court.

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(3)

This Court should correct the misperception of the court of appeals that defendants may not simultaneously assert the right to a speedy trial under the 6th Amendment and the right to due process under the 14th Amendment and that the assertion of one constitutes a waiver of the other.

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(4)

This court should settle the question of whether or not deliberate police failure to collect and preserve evidence, active concealment and misuse of evidence before a grand jury and judicial interference with the jury's possession and use of duly admitted evidence violates a defendant's right to due process under the 14th Amendment, and the 6th Amendment right to trial by jury.

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OPINIONS BELOW

The order denying Petitioner's petition for rehearing is reproduced at **App., P. 5**

The opinion of the court of appeals is unpublished but is reproduced in the Appendix to this petition at **App., P. 6**

The order of the district court denying Petitioner's motion for new trial is reproduced at**App., P. 9, 10**

The judgment of the district court denying Petitioner's petition for writ of habeas corpus is reproduced at **App., PP. 11-32**

The opinion of the 8th Texas District Court of Appeals affirming the 83rd District Court of Brewster County, Texas is reproduced at **App., PP. 33-52**

The Judgment of the 83rd District Court of Brewster County, Texas is reproduced at **App., PP. 53-59**

JURISDICTION

The Fifth Circuit issued its order denying Petitioner leave to appeal the district court's judgment on 1/23/97. A timely petition for rehearing was denied on 2/21/97.
This court has jurisdiction Under **28 U. S. C. §1254**.

CONSTITUTIONAL QUESTIONS INVOLVED

Fifth, Sixth, and Fourteenth Amendments

STATUTES INVOLVED

The relevant statutes are reproduced at **App., PP. 72-77**

The relevant federal statutory provision is Public Law 104, amending 28 U.S.C., §2254, and Rule 22(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

This was a habeas corpus application filed in the U.S. District Court for the Western District of Texas, Pecos Division. The district judge adopted the findings and recommendations of the magistrate and entered judgment denying the writ, holding that no federal constitutional violations had occurred. He was thereafter recused, and his successor denied a motion for new trial.

Upon Petitioner's written inquiry as to whether or not this judge would issue the certificate required to appeal, the U.S. District Judge signed an order which was entered after the effective date of this statute in which he said, '*the court shall nevertheless grant Petitioner's request to appeal this cause to the Fifth Circuit Court of Appeals pursuant to Fed. R.App. P. 22(b)*'. Upon his representation Petitioner gave timely notice of appeal, and filed a brief, assuming the judge had kept his word.

He hadn't. He had lied.

The court of appeals, notwithstanding the district judge's order, overruled Petitioner's motion to compel him to issue the certificate, and then held that Petitioner was not entitled to have his appeal heard on the merits because the district judge's failure to do what he promised amounted to a denial.

The court then entered an order dismissing Petitioner's appeal.

STATEMENT OF THE FACTS

This case arises from a state prosecution, No. 2733 in the 83rd District Court of Brewster County, Texas. Brewster County has a centuries old tradition of smuggling and political corruption. It sits astride the country's premier land drug smuggling route. It is awash in drug money.

Its indigenous population is fiercely paranoid toward outsiders, especially politically active ones, so Petitioner was a target from the instant he arrived. The incumbent regime officially declared him a '*Politically dangerous person*'.

This Court is cautioned that there are serious discrepancies between what the record shows and what the courts below recite in their several opinions. The opinion of the 8th District Texas Court Of Appeals, is particularly odoriferous. The details have been set forth in briefs hereto filed by Petitioner in the district court below but which, owing to their size and bulk, could not included in the accompanying appendix.

On the evening of October 31, 1989 Petitioner was assaulted for the 5th time by Malone Hill, a superannuated psychopath, who was angry because Petitioner had filed a lawsuit against him. Hill had a long record of violent behavior. He had attacked many other people. In contrast, Petitioner's record was pristine.

Hill knew Petitioner's schedule for walking his dogs because he had been stalking him. He had attacked Petitioner on the street the day before. **St. Tr. R. Vol. 9, P. 90.** He had once been convicted of assaulting petitioner. **St. Tr. R. Vol. 9, P. 86-87, Vol. 12, P. 49.** When he attacked on October 31, 1989 he was armed with deadly weapons and his declared intention was to commit murder. '*I approached him. I got out of the car. I thought I'd hit him in the jaw with it.*' **St. Tr. R. Vol. 8, P.143.**

Notwithstanding the admissions Hill had made to them the police refused to accept any complaint against him, **St. Tr. R. Vol., 8, P. 6, L.4,** then proceeded to conceal such evidence of his crime as they were not able to destroy outright. Hill became the ruling regime's vehicle of vengeance for Petitioner's political intrusions.

When Petitioner persisted, and made arrangements to go directly to the grand jury, the district attorney interfered to prevent this, **St. Tr. R. Vol. 3, P. 45-48,** and then he himself presented false testimony from one of the policemen in order to procure an indictment of Petitioner. **St. Tr. R. Vol. 8, P. 37-38.**

The prosecution and the judge then collaborated to delay trial for more than 20 months. In this interim two witnesses disappeared and two more, including the only independent occurrence witness, died.

The state's evidence showed that on October 31, 1989 Hill drove his car down a blind alley and across the sidewalk at the precise instant Petitioner and his dogs were crossing the alley in front of him. Hill testified he could have driven away anytime he wished but didn't want to, **St. Tr. R. Vol., 9, P. 69, L. 11-16, Vol.8, P. 143, L. 11,** that instead he stopped, shut off his engine, got out, and armed with a weapon which every state's witness including himself testified was capable of causing serious bodily injury or death he pursued Petitioner down the sidewalk to attack him. **St. Tr. R. Vol. 9, P. 134-139, Vol. 8, P. 59, 114.** He knew from past experience that Petitioner wouldn't fight with him. **St. Tr. R. Vol. 11, P. 88-90, P. 92, P. 99-101, P. 106-108, Vol. 13, P.89-91.**

When Hill attacked he claimed to have a gun. During cross examination he complained that Petitioner was trying to get him to admit that. **St. Tr. R. Vol. 9, P. 73, L. 23, 24.**

Hill either disclaimed personal knowledge of, or denied the existence of each and every fact alleged in the indictment and included in the authorization paragraph of the charge given, so that the state could not and did not prove any of the elements of the alleged offense. **St. Tr. R. Vol. 9, P. 145, Vol. 9, P. 56-57, Vol. 8, P. 148, 149.**

Hill said he had all kinds of trouble with his memory, **St. Tr. R. Vol. 9, P. 19, Vol. 16., P. 64,** and that he did not know what year it was, **St.. Tr. R. Vol., 9, P. 7,** what month it was, **St.. Tr. R. Vol.16, P. 61,** who was president, **St. Tr. R. Vol. P. 62,** or many other things of common public knowledge. Had his effort at murder succeeded he would not have been mentally fit to stand trial. Despite all this Petitioner's objection was overruled. **St. Tr. R. Vol. 8, P. 9.**

Later in the trial, having just given Petitioner leave to publish the duly admitted exhibits to the jury, and before any juror had time to examine any one of these the judge confiscated the whole batch. **St. Tr. R. Vol. 11, P. 74, L. 12-16.**

Two of these exhibits were statements Hill wrote, **St. Tr. R. Exh. Vol., and St's (5) & Def's (9),** that graphically described his efforts to kill Petitioner. Until just a few days before trial the prosecution had not only concealed these, it had denied they even existed.

The judge told the jurors at the time they were sworn they couldn't consider testimony or exhibits which had been ordered stricken, and this was clearly what they thought had happened when he snatched them from their hands. **St. Tr. R. Vol. 6, P. 117-118.**

In the course of prosecution rebuttal at closing argument, while commenting on these same exhibits, the attorney for the state made several direct and impermissible comments on Petitioner's election not to testify. At the same time he injected his own unsworn testimony. For example,

he told the jury he hadn't seen or heard any evidence of a Hill attack the day before, when this incident was described in one of his own exhibits and by Hill's testimony. **St. Tr. R. Vol. 14, P. 34, 35, 36 & 37, L. 4, 5 ,6, & 7.** He complained Hill got on the stand and told them what happened but Petitioner hadn't, and that he couldn't '*cross examine*' another state's exhibit, **St. Tr. R., Exh. Vol., St's (9),** which was Petitioner's motion to dismiss the indictment.

Later, on appeal, contrary to what the record shows, he claimed his comments had been invited and that error was not preserved because the court had not made a vocal ruling on the objection. However, Texas has a statute, **Art. 38.08** of **Vernon's Annotated Texas Code Of Criminal Procedure**, and case authority, *Willis v State*, 785 SW2d 378, Tex. Cr. App., (1989), *Valles v State*, 817 SW2d 138, Tex. App., El Paso, (1991), which except such comments from the contemporaneous objection rule altogether.

Thus, despite Petitioner's diligent efforts, and disregarding an instruction to consider all the evidence, the jury retired to deliberate without the confiscated exhibits, without ever having examined a single one of the exhibits, knowing absolutely nothing of their true contents.

After trial, Petitioner learned of the judge's secret ex-parte relationship with the defendant in a civil case he had just heard and had under advisement while the criminal trial was in progress. **St. Tr. R. Vol. 16, P. 91, Vol. 18, P. 30-42.**

Petitioner was plaintiff in that suit. The district attorney who had initiated this prosecution had a direct and substantial financial interest in its outcome.

During the time Petitioner's appeal was in preparation this same district attorney became first a judge, then chief judge of the 8th Texas District Court of Appeals. Although he theoretically recused himself from participating

in the decision he left his tracks in the opinion by reference to matters dehors the record that only he would have known.

Because of this conflict the trial judge was recused from participation in subsequent post-trial proceedings and reprimanded by the Judicial Conduct Commission, but this could not be accomplished until after he had denied Petitioner's motion for new trial.

SUMMARY OF ARGUMENT

A rational trier of fact as contemplated by **Jackson v Virginia**, is one that determines, by examining and weighing 100% of the duly admitted evidence, whether it has or has not a reasonable doubt that all of the elements of an offense defined by state law have been proven. A jury that, for any reason, does not do that is not a rational trier of fact and as a matter of law any verdict it reaches is based on insufficient evidence. The constitutional right to due process of law is a absolutely unwaivable right whose absence renders judicial actions totally void.

Without constitutionally sufficient reason a state cannot deny a party the benefit of state legislation and judicial precedent requiring proof beyond a reasonable doubt of all facts pleaded and charged, which is afforded all other persons similarly situated, and such denial deprives that party of both due process of law and equal protection under the law.

Construction of a state statute, arbitrarily, irrationally, and discriminatorily, so as to obligate a selected person to insure the safety of an assailant attempting to murder him, contrary to settled state law, violates both the due process clause and the equal protection clause of Amendment XIV.

A federal court may not find procedural default based on a state's allegations that contemporaneous objection was not made to prosecution comments violating the 5th Amendment right not to testify when by the settled law of the state involved no objection is necessary to preserve error in this circumstance. Nor may a federal court defer to a finding of invited argument made by a state court when the same is demonstrably contrary to the evidence in the record.

Once evidence is duly admitted and placed in the custody of the jury any interference by the trial judge which prevents the jury from examining it usurps its province and abridges the accused's Sixth Amendment right to trial by an impartial jury .

Inadequate Police investigation, failure to procure, protect and preserve vital evidence, prosecution concealment of evidence from both the defense and the grand jury, and obtaining indictment by using false evidence renders the entire process of accusation and trial fundamentally unfair.

An accused cannot be required to elect between constitutional rights but may exercise any or all of them simultaneously, each to its full extent. A finding by a state trial judge that none of the delay of trial was caused by the accused is a fact finding to which the federal court must defer. Death or dissappearance of witnesses, particularly a disinterested occurrance witness, is ipso facto prejudicial to the defense.

REASONS FOR GRANTING THE WRIT

1) This Court should correct the misperception of the court of appeals that Jackson v Virginia is no longer the law of the land and should reaffirm that due process of law means proof beyond a reasonable doubt of every fact required by the law of the prosecuting jurisdiction.

In ruling that it found no federal constitutional violations in this case the court below placed itself in direct conflict with *Jackson v Virginia*, 443 U.S.307, (1979), and its antecedents, *Davis v. U.S.*160 U.S. 469, (1895), and *In Re Winship*.

These cases demand proof beyond a reasonable doubt of every fact necessary under the law of the charging state.

It is axiomatic that jurors who have to guess about what the duly admitted evidence is because they've never seen it have no rational basis for ruling out reasonable doubt. The trial by jury contemplated by the **6th Amendment of the U.S. Constitution** must be a meaningful deliberation upon all the lawfully admitted evidence.

The jurors could gain no insight into guilt or innocence from this ambiguous stack of papers sitting on a desk beyond their reach. Such insight arises only from thorough examination, which didn't even come close to happening.

The exhibits were anything but inconsequential, they were the heart and soul of the defense, exculpatory of guilt, damning to the prosecution.

Included among them were two statements written by the complaining witness, offense reports relating to his prior conviction for assaulting Petitioner, court records relating to his assaults on other people, correspondence relating to Petitioner's lawsuit then pending against him, documents originating with a police officer who had testified he had omitted everything exculpatory from them and then used them before the grand jury, other accounts of details of prosecution misbehavior, and all the photographs of the scene.

The very fact that all of these exhibits had been duly admitted, mostly without objection, forecloses all question

of their relevance and materiality To satisfy Jackson and perfect these two most basic rights, trial by jury and due process of law, the jury was constitutionally obligated to deliberate upon the weight of these exhibits. They didn't do that.

The trial judge could have remedied this by granting the defense motion for a new trial. It was against his personal interest to do that. He knew this was wrong and that he was culpable. Undoubtedly, this is why he remarked on the record, during sentencing, that the case should never have been prosecuted. **St. Tr. R. Vol. 16, P. 84.** There are numerous other peculiarities associated with the judgment he entered in this case, all of which were raised in the petition for habeas corpus and addressed by the district court. This judgment does not satisfy the requirements of Texas law. It is void on it's face.

This court said, in numerous cases, i.e., *Brady v. Maryland* 373 U.S.83, (1963) and *Giles v. Maryland*,386 U.S. 66,(1967), that police or prosecution concealment of such vital evidence as these confiscated exhibits represented violates the due process clause of the **14th Amendment of the U.S. Constitution**. The rules they establish should be expanded to deal with judicial interference which amounts to the same thing and works the same injustice.

What made this immeasurably worse in the case sub judice was that everybody, including the judge, whose primary obligation it was to insure that the trials he held were fair, joined in this pernicious activity.

How is judicial misconduct different or less contemptible than police or prosecutorial subversion? Why should it matter why a trier of fact has failed in its mission to satisfy the due process requirement? How could laying blame either excuse its absence or make that absence any worse?

The judgment of the district court, and the order denying the motion for new trial and the orders entered by the 5th circuit Court of Appeals all say there that were no federal constitutional violations in this case, but the one thing that not one of them deny is that the jury never saw a major part of the lawful, duly admitted evidence. No one -- absolutely no one controverts this fact.

Due process cannot be measured in degrees. It is either present or not present. Due process exists only as an entirety. Like pregnancy or death, it is all or nothing.

Despite the simplicity of this concept it was beyond the grasp of the court below.

Petitioner concedes this incident to be unique in American Jurisprudence, Although it is common practice in other totalitarian countries, never before during forty years in this profession has Petitioner seen or heard of any judge anywhere in this country doing what this judge did. Neither has any precedent been found.

The *Jackson* test, as it is, cannot handle this situation. To fit its facts the standard of review must be changed FROM: 'whether any rational trier of fact could have found guilt from the evidence of record', TO: 'whether any rational trier of fact could have found guilt from the evidence of record *which it has actually seen and considered.*' That is a monumental difference.

Due process means trial on the evidence, not on the jury's guess about what the evidence is.

2) This Court should correct the misperception of the court of appeals that different treatment by a state of individuals within the same category or class under identical factual circumstances does not violate the equal protection clause and is not a federal constitutional

violation conferring habeas corpus jurisdiction on a federal court.

Jackson v Virginia, Supra, says, Footnote 16]:

> 'The respondents have suggested that this constitutional standard will invite intrusions upon the power of the States to define criminal offenses. Quite to the contrary, the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law'.

The magistrate, whose findings the district judge adopted, cites *Brown v. Collins*, 937 F2d 175, CA5, Tex., (1991), as the source for determining what the substantive elements of offenses are in Texas.

The trouble with *Brown* is that *Brown* says certain of the substantive elements established by the Texas legislature and appellate courts represent '*a nuance not of constitutional caliber*'.

Brown is thus in direct head-to-head conflict with this Court's holdings in *Mullaney v Wilbur*, 421 U.S.684, (1975), which binds federal courts to state court construction of their own law, and *Dunn v. U.S.*, 442 U.S. 100, (1979), which prescribes that defendants must be tried on the specific charges under which they stand accused.

Dunn makes it pretty clear that when a state court says something is an element, or part of an element there must be no further argument.

The 8th District Texas Court of Appeals, deciding a case brought under the identical statute involved in the case sub judice, held, *Collins v State,* 890 SW2d 893 at 898, Tex.

App., El Paso, P. 893, (1994); *'Under* ***Texas Law*** the ***elements*** *of a criminal offense* *are: (1), the forbidden conduct, (2) the required culpability, (3), any required result, and (4), the negation of any exception to the offense'.* (Emphasis added)

Coincidentally, this is the former District Attorney who engineered this prosecution of Petitioner, speaking Ex Cathedra as chief justice, quoting Vernon's Annotated Texas Penal Code, Sec. 1.07 (22) verbatim.

The Texas Court of Criminal Appeals ruled, in *Ortega v State*, 668 SW2d 701, Tex. Cr. App, (1983) and *Arceneaux v. State*, 803 SW2d 267, Tex. Cr. App., (1990), that, once an instruction, correct in terms of the insufficiency rationale in *Jackson v Virginia* is incorporated into a charge in such a manner as to require the jury to find that fact beyond a reasonable doubt before it can render a verdict of guilt the state must object to the instruction, requesting a modification of the one submitted, or prove that substantive fact, otherwise the evidence is insufficient as a matter of law to support the only verdict of guilty which was authorized.

The district judge, Opinion, P. 8-9, claims there are allegations in the indictment and charge that are not in fact there, and he totally ignores the testimony of the state's medical witness that the supposed events recited on P. 5 & 6 of the opinion could not have happened without leaving conspicuous signs which he would have found and didn't find. **St. Tr. R., Vol. 10, P. 5-10, P. 18-20.**

This testimony is incredible as a matter of law. Such things simply do not occur in nature, any more than that the two dogs, whose presence Hill initially acknowledges but otherwise doesn't mention, would have quietly stood by and watched. Logic suggests that if he sustained an injury at all it would have been a dog bite. The adverse inferences to be

drawn from what Hill didn't say are far more reliable than his testimony.

Ever since the Texas law was clarified by the doctrine expounded in the *Ortega v State*, Supra, it has been consistently and uniformly followed and applied without deviation in every case arising on like circumstance -- except in the case sub judice. More than a hundred subsequent decisions of the Texas Appellate Courts have since reaffirmed it is the substantive law of this state.

In the case sub judice both the indictment and authorization paragraph required proof of a particular, specifically identified fact beyond a reasonable doubt, forbidding conviction and mandating acquittal if this wasn't proven beyond a reasonable doubt. The state neither objected nor introduced even a shred of proof. To a man, every prosecution witness denied all knowledge of this alleged fact.

The state did no better on the rest of the elements. Its case didn't just flunk *Jackson v. Virginia*, Supra, it flunked *Thompson v. Louisville*, 362 U.S. 199, (1960) as well.

The prosecutor's troubles with the first element, the forbidden conduct, began when he asked Hill about this alleged fact, which was the very foundation of the state's case, and Hill answered, '*I guess, I don't know*'. **St. Tr. R. Vol. 8, P. 145.** After Hill, the other prosecution witnesses who followed did the same. **St. Tr. R. Vol. 8, P. 105.**

The second element, specific intent to cause injury, the offense being result oriented, is not supplied by proof of mere presence or even engaging in conduct that might cause injury. Texas law does not require victims to insure the safety of people who hunt them down and try to kill them, *Alvarado v. State*,704 SW2d 36, Tex. Cr. App, (1986), *Haggins v. State*, 785 SW2d 827,

Tex. Cr. App., (1990). Such people, if so disposed, can easily avoid the risk of injury simply by keeping their hands off other people's bodies.

The third element, any required result, could not be established and was not established by Hill's testimony that although he had a cut on his butt he did not know how, where or when he got it. **St. Tr. R. Vol. 9, P. 56-57.** Nothing except conjecture connects this cut either to Petitioner or to the occurrence. **St. Tr. R. Vol. 8, P. 148-149.**

Moreover, Hill testified he fled the scene when his assassination attempt went sour, and that he only returned much later, after the police arrived. **St. Tr. R. Vol. 8, P. 148.** The record is silent as to his activities during this absence.

The fourth element, the negation of any exception, falls flat because the prosecutor declared in the presence of the jury, '*We're not claiming Mr. Hill was defending himself, O.K.?*', **ST. TR. R. Vol. 8, P. 101, L. 19**, and followed his admission up with Hill's admission that he was attempting to commit cold-blooded murder.

Hill's testimony was that although he faced no force whatsoever, or any threat of force, and could have driven away anytime he wanted, he didn't want to, **St. Tr. R. Vol. 9, P. 67-B to P.73**; that he left his car, and being then armed with a deadly weapon, he pursued Petitioner, who was at that time in flight, down the sidewalk in order to attack him. **St. Tr. R. Exh. Vol., S's (5) & Def's (9).** The exhibits, many of them state's exhibits, both corroborated this damning testimony and furnished further details.

Having itself raised self defense as an exception, the state was then obligated to negate it as part of its burden of proving Petitioner guilty beyond a reasonable doubt. It

didn't negate this exception. It proved the exception's existence instead, so the presumption of innocence prevails.

As to Petitioner, the state failed to prove even a corpus delicti, though it proved an airtight case of attempted murder against Hill.

Under well settled Texas law Hill's behavior was both aggravated assault and attempted murder and by both statute and viable precedent this entitled Petitioner to respond with deadly force if a reasonable man in these circumstances would have done so. *Rhoden v Booth*, 344 SW2d 481, Tex. App., (1961), P. 485, *Perez v State*, 290 SW2D, 514, 516, Tex. Cr. App., and *Holmes v. Holmes*, 588 SW2d 674, Tex. App. Beaumont, (1979), **Vernon's Annotated Texas Penal Code, § 9.31, 9.32**.

If the state had proven Petitioner used any lesser force, and it didn't, and had proven that Hill got his butt cut at this time, and it didn't, and that Petitioner inflicted the cut, and it didn't, so what? What is this, balanced against somebody's life?

The bedrock of due process as the 14th Amendment knows the concept under *Jackson v. Virginia, Supra,* is that every party accused is entitled, not only to be judged under the law of the state which charges him, but to receive the same treatment that state gives everybody else under identical circumstances.

Again, that didn't happen. State law, promulgated for the specific purpose of insuring that all state trials would pass the *Jackson* test, was ignored in this case and in this one case only.

From the dawn of the day of its creation this Court has acknowledged that in the very process of enacting penal statutes states also simultaneous generate liberty interests that federal courts are constitutionally obligated to protect and enforce.

The right to equal protection is one of these, and because it was abridged Petitioner has come to this Court.

3) This Court should correct the misperception of the court of appeals that defendants may not simultaneously assert the right to a speedy trial under the 6th Amendment and the right to due process under the 14th Amendment and that the assertion of one constitutes a waiver of the other.

Texas law provides a very narrow right to depose witnesses in criminal cases. Upon Petitioner's demonstrated need he was given leave to depose the witnesses on the state's list who had not voluntarily submitted to interview.

The state defied this order, as well as the order to furnish criminal histories and other *Brady* Material.

Had the state complied with discovery orders on schedule, with or without enforcement action by the judge, there would have been no delay of trial, and trial would have been completed while the witnesses who later disappeared or died were still available to testify.

Petitioner tried to expedite discovery with motions to sanction the state. **St. R. Trial Transcript**. Two timely speedy trial demands were filed, the first immediately after the prosecutor refused to produce the witnesses on the date he had chosen. It was combined with a motion to dismiss the indictment because of prosecution misconduct. No witness had yet died or disappeared.

The judge totally ignored this case.

A whole year elapsed between the hearing on Petitioner's motion to depose witnesses on August 13, 1990 and the next docket call on August 12, 1991. Even that one would never have occurred had not Petitioner filed

application for a writ of mandamus in the Court of Criminal Appeals to compel the judge to move.

The mandamus infuriated the judge, who then summarily denied all pending defense motions, set trial for the following week and ordered depositions instanter.

By then 20 months had passed. Two witnesses had vanished, two had died, and one of the latter was the crucial occurrence witness the prosecutor knew was hostile to the state and supportive of Petitioner.

The trial record shows no explanation or excuse by the prosecutor or judge. It does show that the trial judge found as a fact none of the delay was Petitioner's fault. **St. Tr. R. Vol.4, P. 47, L. 15-19.** Contrary to the claim of the court below this declaration could not have been more plainly in context than it was.

Only the prosecutor and his supporters benefited from the delay. The prosecutor had at last acquired a measure of control over his mortal enemy, a person allied with the political opposition which eventually drove him from office, and whom he had officially declared to be a '*Politically dangerous person*'. He clung to this by delaying trial. Against an unfavorable eyeball witness, he knew he had another sure loser. Petitioner had beaten him in every case they had ever tried together.

Delay hardly benefited Petitioner, who wanted to get on with trial, end this onerous restraint and finish off the corrupt regime.

The loss of the witnesses changed everything. Now, as the prosecutor told the jury, his case had become, '*A swearing match*', **St.Tr. R., Vol. 6, P. 64, L. 21,** between Hill, the insider who was above the law, and petitioner, who had been effectively outlawed. The need to determine what the state's witnesses would say was correspondingly magnified.

The state had filed a long list of people it claimed it would call. All but one of them either failed to respond to certified mail requests to submit to interview or refused delivery of the letters. They could be deposed.

By contrast, under Texas law, a cooperative witness cannot be deposed unless there has also been a present showing he will be unavailable to testify at trial. (In the judgment he entered, P. 17, the U.S. District Judge suggested Petitioner should have perjured himself so he could depose the dead eye-witness. The magistrate, ignorant of the rule against it, advocated the use of hearsay evidence). **Vernon's Annotated Texas Rules Of Criminal Evidence, Rule 801 (d).**

Out of more than a dozen on the list, and of those ultimately deposed, the state called only one witness, an Alpine policeman, and it was at his deposition, bare days before trial was set, that he unintentionally revealed the state had two written statements from Hill which it had concealed for almost two years, contrary to the order to disclose *Brady* materiel. This is the only reason the prosecutor finally coughed them up.

That revelation alone shoots the argument for waiver full of holes and vindicates Petitioner for insisting on having discovery, even though because the statements were among the confiscated exhibits he lost their benefit anyway. The prosecution's total control of all the witnesses and of official records enabled it to get away with many other *Brady* violations.

This harebrained waiver theory originated with the 8th District Texas Court of Appeals, over which the D.A. who actually was responsible for the delay then presided.

The U.S. District judge adopted the idea, claiming it was a factual finding by the state appellate court to which he had to defer. That isn't true, of course. That conclusion

wasn't supported by the record, it was repugnant to the record.

To characterize this behavior, per **Supreme Court Rule 10 (a),** as a departure from the accepted and usual course of judicial proceedings would be a gross understatement. None of the cases above-cited suggest election is required, or that constitutional rights cannot be simultaneously exercised.

Requiring election has the effect of overruling *Giles v Maryland, Brady v Maryland,* both Supra, *U.S. v Agurs*, 427 U.S. 97, (1976), and all their derivatives, and gives any prosecutor the power to disarm any defendant simply by refusing to comply with the mandates of these authorities.

What is certain is that when this Court decided *Barker v Wingo*, 407 U.S. 514, (1972), in which it expounded at some length on the subject of waiver, citing such prior and pertinent decisions as *Johnson v Zerbst*, 304 U.S. 458, (1938) and *Carnley v Cochran*, 369 U.S.506, (1962), it never contemplated that circumstances such as these would satisfy the tests those cases established.

In the case sub judice there clearly occurred a radical departure from the accepted and usual course of judicial proceedings. The 5th Circuit Court of Appeals just as clearly sanctioned this, and the exercise of this Court's supervisory power appears to be appropriate.

Moreover, the question of whether simultaneous exercise of all available constitutional rights can be curtailed is undeniably federal, undeniably important and as yet neither addressed nor settled by this court.

4) This court should settle the question of whether or not deliberate police failure to collect and preserve evidence, active concealment and misuse of evidence before a grand jury and judicial interference with the jury's possession

and use of duly admitted evidence violates a defendant's right to due process under the 14th Amendment, and the 6th Amendment right to trial by jury.

The testimony of Bryan Ward of the Alpine Police Department was strange indeed. He testified he and a partner responded to a complaint that murder had been attempted. He did not recover Hill's weapon, **St. Tr. R. Vol.8, P. 29,** which the dead witness showed him was lying on the sidewalk, he did not arrest Hill though asked to do so upon Hill's confession, he took no witness statements, he didn't look for the gun Hill claimed to have had, he didn't look for witnesses but merely stood under the streetlight to see if any volunteered, he thought collecting and preserving evidence was the victim's job, **St. Tr. R. Vol. 8, 110,** and left it all uncollected at the unsupervised scene while he carted Hill off to seclusion.

Although acknowledging both from the stand and in his report that Petitioner claimed Hill tried to run over the dogs and he, and though the dead witness showed him Hill's skidmarks, **St. Tr. R. Vol. 8, P. 29,** he did not photograph these as he did the window Hill had broken.

He testified he had selectively omitted from his report all reference to Hill's written and oral admissions of being armed and of pursuing Petitioner down the sidewalk in order to attack him. He testified he used this report before the grand jury but did not tell them about all the things he had omitted. **St. Tr. R. Vol. 8, P. 36, 37, 52, 53.**

This is what the 8th District Texas Court of Appeals called an '*adequate police investigation*'?

The record shows a entirely different picture, a mission with three objectives: rescue Hill before he shoots his mouth off in public any more than he has already, destroy

all evidence of Hill's crime and block Petitioner from filing a complaint against Hill.

It worked, to a point, although he left many loose ends the D.A. and the trial judge eventually had to tie up. His misbehavior has to be considered in the light of theirs.

In *Brady v. Maryland*, Supra, this Court settled the question of whether due process is violated when prosecutors fail or refuse to disclose favorable evidence material to guilt or innocence.

Petitioner has, herein and above, asked the Court to settle whether confiscation of evidence by the judge also violates due process.

This court has yet to say with specificity whether a Brady-style violation occurs if police make only a sham investigation, or if they lose, destroy or secret evidence potentially favorable to the accused. So far, it has merely danced around the point a little. *Foster v. California*, 394 U.S. 440, (1969) and *Mooney v Holohan*, 294 U.S. 103,(1935).

But the Texas Court of Criminal Appeals, acknowledging this was an important question of federal law, confronted it headlong in *Ex Parte Brandley*,781 SW2d 886, Tex., Cr. App (1990), and held this does in fact deny due process.

In *Brandley*, the police knew of other suspects on scene, knew blood inconsistent with Brandley's type had been found on the deceased's body, yet failed to collect blood and semen samples from their other suspects or share these findings with the defense.

Because the police normally have total and exclusive control of the scene and a monopoly on collecting and preserving evidence, because persons accused are so vulnerable to harm occasioned by sloppy and inadequate

investigations, and because every defendant is potentially a victim, this question is a very important one.

This court should seize this opportunity to settle it.

5) This Court should clarify the obligations of district judges and appellate judges with respect to the granting or denial of certificates of appealability in 28 U.S.C. §2254 cases.

The general consensus among the several U.S. Courts of appeal seems to be that as to this category of **§2254** cases only the name of the required certificate has been changed. Since the effective date of amendment the court below has continued to recognize the power of district judges to issue these certificates and concedes that when this occurs the appeal must be addressed on its merits.

What is now in contention is the appellate court's obligation where a district judge says he is issuing a certificate but never does it.

The district judge's order of May 2,1996 was not a denial of the certificate. It acknowledged he had been solicited to issue the certificate required by **Fed. R. App. Pro. 22(b)** to appeal the judgment he had entered and that is what he said he was doing.

The language of **22(b)** is just as clear. The appellate judges' power to issue a certificate is conditioned upon denial below, otherwise that court's only choice is to hear the appeal on its merits.

Upon learning that the district judge had neglected to issue the actual, physical certificate Petitioner moved the appellate court to order him to do so or in the alternative to treat the order he signed and entered as the certificate's equivalent so the case might be set for submission. In a

nutshell, the court of appeals was asked to compel him to make good on the contemptible lie he told.

This was not only within this courts power but consistent with traditional equitable principles. Instead, the court denied the motion in order to act contrary to **Rule 22(b).**

Customarily, parties, witnesses or attorneys who behave as this district judge did are sanctioned, and not infrequently prosecuted for obstructing justice. But judges seem to be a privileged aristocracy, above the law even when they lie, as this one did, even when they have forbidden, ex-parte dealings with witnesses, as this judge's predecessor did, and even when they interfere with the function of juries, as the state trial judge did.

Sooner or later every victim of such injustice, however patient he is, reaches the point where he will take no more of it. This country would not exist were this not so. I will take no more of it.

This situation clearly mandates the exercise of this Court's supervisory power. There is yet no guiding authority on this particular point, and won't be, until this court makes some.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Dated: _____ , 1997, Alpine, Texas

Respectfully submitted,

_____

Joseph H. Delaney,

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FILED

97305 MAY 20 1997

No [redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term , 1996

JOSEPH H. DELANEY,

Petitioner

v.

CHRISTINE RODRIGUEZ,

Respondent

On Petition For The Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Filed 2/21/97

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50422

JOSEPH H DELANEY
Petitioner - Appellant

V.

CHRISTINE RODRIGUEZ, Adult Probation Officer

Respondent - Appellee

Appeal from the United States District Court for the Western District of Texas, Pecos

---

Before SMITH, DUHE and BARKSDALE, Circuit Judges.

BY THE COURT:

A member of this panel has previously denied appellant's requeste for a certificate of appealability. After consideration by this panel upon request of appellant, IT IS ORDERED that appellant's motion for reconsideration is denied
MOT-29

FILED 1/23/97

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOSEPH H. DELANEY,

No. 96-50422

v USDC No. P-94-CV-31

CHRISTINE RODRIGUEZ, AdultProbation Officer

Appeal from the United States District Court for the Western District of Texas

ORDER:

Joseph H. Delaney seeks a certificate of appealability (COA) to appeal the district court's denial of his petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. BecauseDelaney has failed to make the showing required to obtain a COA , his motion is DENIED.

s/s JOHN M. DUHE", JR.

UNITED STATES CIRCUIT JUDGE

THE UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

JOSEPH H. DELANEY
v. P-94-CA-031
DAN MORALES, Attorney General of
The State Of Texas, et al.

ORDER

BEFORE THE COURT, in the above-captioned cause of action, is a request in the form of a letter from Petitioner to appeal the denial of his habeas corpus petition. Although this court does not accept fax filings, see Fed. R. Civ. P. 5(e); Local Rules CV-5(a0, (c) and (e), the Court shall nevertheless grant Petitioner's request ro appeal this cause to the Fifth Circuit Court of Appeals pursuant to Fed. R. App. P. 22(b).

IT IS SO ORDERED.

SIGNED this 1st day of May, 1996

s/s HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

JOSEPH H. DELANEY

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Alpine, Texas - 79831

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By Fax to: 915/445-9859

April 29, 1996

Hon. Lucius Bunton, Senior U. S. District Judge
Western District Of Texas, Pecos Division
P. O. Box 191
Pecos, Texas - 79772

Re: P 94 CA 031

Dear Judge Bunton:

I am in receipt of your order in the above dated 4-25-96 and filed with the office of the clerk on 4-26-96. It is my intention to appeal this order to the 5th Circuit Court of Appeals, for which purpose I will require a certificate of probable cause, Per **F.R.A.P. 22 (b)**.

Kindly advise me as soon as possible whether it is your intention to grant or to deny me this certificate.

Very truly yours,
s/s Joseph H. Delaney

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

JOSEPH H. DELANEY
V.
DAN MORALES, Attorney General of)
the State of Texas. et al.

P-94-CA-031

ORDER

BEFORE THE COURT is, inter alia, Petitioner's federal habeas corpus (filed 7/15/94, Doc. # 1), Magistrate Judge Louis Guirola's Proposed Report and Recommendation (filed 5/18/95, Doc. # 50), Petitioner's Objections (filed 5/30/95, Doc. # 53), District Court Judge Royal Furgeson's Order Adopting Magistrate's Report and recomendation (2/16/96, Doc. # 86), Petitioner's Motion to Disqualify Judge Furgeson (filed 2/20/96, Doc. #88), and Petitioner's Objections to Judge Furgeson's Order Adopting the Report and Recommendation (filed 2/26/96, Doc. # 89).

After a complete review of the record,' this Court is satisfied that there has been no showing of constitutional violations in the state court proceeding below. Furthermore, this Court is satisfied that all issues argued by Petitioner have been duly addressed and disposed of by the Proposed Report and Recommendation of Magistrate Guirola filed on May 18, 1995, and likewise all objections and additional issues argued by Petitioner have been duly addressed and disposed of by the Order of Judge Furgeson filed February 16, 1996.

Accordingly, IT IS ORDERED Petitioner's writ of habeas corpus is hereby DENIED.

SIGNED THIS TWENTY- FIFTH day of April, 1996

s/s HONORABLE LUCIUS D. BUNTON, III
SENIOR U.S. DISTRICT JUDGE,
Pecos Division

1/ A record that has been painstakingly and thoroughly compiled by Judge Furgeson prior to this Court's review.

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

JOSEPH H. DELANEY,
Petitioner,
V P-94--CA-031
CHRISTINE RODRIGUEZ
Respondent.

ORDER ACCEPTING MAGISTRATE'S PROPOSED FINDINGS OF FACT AND RECOMMENDATIONS AND DENYING PETITIONER'S WRIT OF HABEAS CORPUS RELIEF UNDER 28 U.S.C. 2254

On this date, this court considered United States Magistrate Judge Louis Guirola's PropoBed.Flndings of Fact and Reccomendations filed on May 16, 1995. The court is of the opinion that said findings should be accepted and said recommendations should be adopted, for the reasons stated herein.

1. PROCEDURAL HISTORY

Petitioner wao charged by a Brewster County, Texas grand jury.with "intentionally and knowingly by act engage (sic) inconduct that caused to an individual. Malone V. Hill, who is eighty-five (85) years of age or older, bodily injury by strikingand hitting said Malone V. Hill with his fists." Petitioner, a lawyer licensed by the State of Texas, pled "not guilty to the charge and represented himself at trial. A jury found him guilty on October 4, 1991, and punishment waa assessed at four years probation. Petitioner appealed his conviction to the Eighth District of Texas Court of Appeals, which affirmed the judgment of the trial court on October 19, 1993. Delaney v State,

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No. 08-91-00403-CR. His petition for discretionary review was refused by the Texas Court of,Criminal Appeals.

Petitioner filed a state application for writ of habeas corpus purouant to Article V, Section 8 of the Texas Constitution. The trial court.coriducted a hearing and declined to issue the writ June 3., 1994. Although Petitioner filed an appeal of the trial court's denial of his application, he withdrew the'appeal soon afterward. It is not clear whether Petitioner has fully exhausted his state court habeas remedies. However, a petitioner generally need not utilize state habeas corpus or other state collateral proceedings to satisfy the requirement that he exhaust available state remedies. Brown v Allen, 344 U.S.,443, 447 (1953); Lowe M. Scott, 48 P.3d 873, 875, (5th Cir. 1995). In this case, Petitioner has presented each of the issues in his federal petition to the Texas Court of Criminal Appeals through the direct appeal of his conviction and sentence. Therefore, he has adeqately exhausted hie state court remedies through the appellate process.

11. STANDARD OF REVIEW

When a party objects to a Memorandum and'Recommendation the court is required to "make a de novo determination of those portions of the report or specified proposed findings or recommndettions to which objection is made. 28 U.S.C. 636(b)(1). See also Longmire v. Guste, 921 F.2,d 620, 623 (5th Cir. 1991) (party is "entitled to a de novo review by an Article III judge as to those issues to which an objection is made").

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Such a review mans that the court will examine the entire record, and will make an independent assessment of the law. The court need not, however, consider objections that are frivolous, conclusive or general in nature. Battle v. United States Parole Comm'n, 834 P.2d 419, 421 (5th Cir. 1987).

III. PETITIONER'S OBJECTIONS

Petitioner objects to each and every conclusion of law and finding of fact by the Magistrate. The objections are generally focused around five separate issues: A) sufficiency of the evidence; B) the prosecutor's closing argument; C) misconduct by judge and jury; 1)) the form of the Judment; and E) pre-trial matters.

IV, ANALYSIS

A. Sufficiency of the evidence

Petitioner argues that not all the elements of this offense have been proven beyond a reasonable doubt. Petitioner cites to § 1.07 of the Texas Code to support his contention that there are four elements to this crime. Petitioner has incorrectly cited to the definition section of the Texaa Penal Code which sets out what an "element of the offense means. The particular elements of the offense for which the Pet:itioner was charged are set forth, as noted by the Magistrate, in § 22.04 of the Texas Penal Code. TEX. PENAL CODE Ann.. § 22.04 (Vernon 1.994).

Petitioner argues that Texas. law demands that each element of the crime muat be proven. He claims that this Texas standard for affirming a conviction is more demanding than the federal standard and cites Arceneaux v State, in support of that proposition. 803 S.W.2d 267 (Tex. cr. App. 1990). Because the Texas standard is more demanding Petitioner claims the federal

standard applied to this case "Must rise to the higher plane and insist on full complete compliance.' Petitioner cites Jackson v Virginia in support of this preposition. 443 U.S. 307, rehearing denied, 444 U.S. 890 (1979).

To begin with, the court fails to see a holding in Jackgon an argued by Petitioner. Rather, the court's obligation in reviewing a state court conviction is to prohibit a criminal

conviction of any person except upon proof of guilt beyond a reasonable doubt. "The applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 324.

Further, the court does not find any distinction along the lines argued by Petitioner between the Texas standard and the federal standard as outlined in the holdings of Jackson and Arcceneaux respectively. 443 U.S. at 320-21; 803 S.W.2d at 271- 72. The court in Arceneaux dealt primarily with the prosecutor's obligation to meet its burden of production as set forth in the jury charge. The court specifically referenced the holding in Jackson, namely that the sufficiency of the evidence is reviewed in the light most favorable to the verdict. Arceneaux, 802 S.W.2d at 270 (quoting Benson v. State, 661 S.W.2d 708, 72.5 (Tex. Cr. App. 1982), cert. denied, 467 U.S. 1219 (1984)).

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Thus, in determining whether to grant Petitioner the habeas relief he has requested, the court reviews his conviction to determine whether a rational trier of fact could have found proof of guilt beyond a reasonable doubt. Petitioner argues that the Magistrate's report does not specify any place in the record of the trial or the state court appeal which establishes that the elements of the crime are proven. Further, Petitioner lists a litany of facts in his objections whi.ch he believes compels a reversal of his conviction. They include, but are not limited to, evidence of a sloppy police investigation which failed to check for blood at the scene, claims that no evidence tied the cut in the victim's buttocks to Petitioner's actions, contradictions and physical inconsistencies in the victim's testimony, problems with the victim's credibility and evidence that Petitioner was defending himself from impending deadly force.

After reviewing the record, this court concludes that a rational trier of fact could easily have found proof of guilt beyond a reasonable doubt. The evidence is undisputed that Hill was over the age of 65, thus satisfying the first element of the offense. As to the second element, excerpts of the sworn courtroom testimony of Hill describing the incident are as follows:

Q.- What happened next, sir?
A. He reached down with ... between ... I was...he was up, almost up to this ... above me, and he reached down between my lega...
Q: Yes, sir?
A: Between this leg here, and this one, and lifted me

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up...to shoulder level...
Q; Yes, sir?
A: ...and slammed me down with my head to the north...
Q: All right.
A- ...onto the sidewalk.
Q: How did that feel?
A: Pardon?
Q: How did that feel?
A: well, I saw a faw ... a few stars, and it...it knocked me out.
Q: What, uh...
A: The back of my head hit.
Qi What did he do ... What happened once he threw you down?
A; What? Well ... once he threw me down he got on top of me with bis body and his weight... and got his knees down on me and so forth, and hi(t) ine in the face several times.
Q: What did he hit you with?

A: His fists, I guess. I don't know.
Q: All right.
A But he had me...
Q: Then what happened?
A: He had me down. Well, let's see. Finally, he got ... he got up and he says...he says, Stand up, you son-of-a-bitch. He wouldn't say alnything to me that it didn't and up with that word.
Q: All right, sir. And did you starnd -up?
A: I tried to gret up, and he says, hurry up!" And reached down and got my right wrist.-.
Q: All right.
A.- ...which had been holding the rock.
Q: Did he help you up?
A; And he pulled me to a ..."Now, Stand up!,,
Q: All right.
A: "Stand up! And so I stood up as straight as I could. I didn't have any idea he was going to shove me through the window.
Q: What happened after you stand up?
A: Well, almost immediately, as I got right, he took both hands from my shoulders and shoved me backward, right through the middle of the glass.
(eight questions later)
Q: Did you go through the window?
A: Oh, yes. I went through the window. And, uh ... my back was, of...
Q! All right.
A: ...course, part that went thr ough.
Q: I take it then, that you went through backwards? is that correct?
A: Correct. Absolutely.
R. 8 P. :L43-147). Moreover, in resolving this issue on

Delaney's appeal, the appellate court summarized the facts as follows:

(O)n October 31, 1989, Dr. Malone Hill was going to buy some candy. He found a street blocked and drove into an alley and encountered the Appellant walking several dogs on a leash. Hill related that the Appellant then came up to his car and put his hands on the hood and accused Hill of trying to kill him. Hill denied such intent and the Appellant cursed him and challenged him to fight. Hill initially declined this invitation. Hill testified that he tried to back his car in an attempt to leave. He was afraid of the Appellant. The Appellant stayed in front of the car and then got up on the sidewalk and name-called and again invited Hill to fight. Hill testified he picked up a rock to use in possible self-defense figuring that he would hit the Appellant on the jaw or scare him off. Hill left the car and approached the Appellant and he hit Hill on the wrist causing the rock to fall. Hill related that the Appellant then picked him up and threw him on the ground causing the back of his head to hit the pavement. The Appellant then got on top of Hill and hit him in the face several times causing Hill to experience pain. Hill testified that the Appellant got off of him, told him to stand up, and then pushed the Appellant through a plate glass window. Hill stated that he received a cut on the left side of his buttocks. Opinion, p. 8 & 9

Pursuant to Title 28 U.S.C. Section 2254(d), factual findings such as those above are entitled to great deference from this court. See 28 U.S.C. 9 2254(d); -Burden v. -Zant, 498 U.S 433, 436-37 (1991) ; LLoyd v Smith, 899 F.2d 1416, 1425 (5th Cir . 1990) ("Federal courts in habeas proceedings are required to grant a presumption of correctness to a state court's explicit and implicit findings of fact if supported by the record.") Both implied and explicit fact findings fall

within the ambit of Section 2254(d), as do factual determinations made by either a trial court or an appellate court. Marshall v Lonberger, 459

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U.S. 422, 433-34 (1983); Sumner v. Mata, 449 U.S. 539, 547, (1981). The burden is on the habeas petitioner to establish by clear and convinc,,4ng evidence that the factual determnations of a state court were erroneous. Sumner, 499 U.S. at 547. Where a atate appellate court has conducted a thoughtful review of the evidence, ita determination is entitled to great deference. Callins v Collins, 998 P.2d 269 276 (5th Cir. 1993) cert. denied, — U.S. —, 114 S. Ct. 1127 (1994). The facts found by the appellate court are fully supported by the record and compel a conclusion that Delaney acted intentionally or recklessly and caused bodily injury to a person over the age of 65 years.

Petitioner also argues that, as in Arceneaux, the prosecutor did not prove the actual events that were alleged in the indictment. 802 SW2d at 270-71. Specifically, the charge here required proof that injury was inflicted by a particular instrumentality, "fists," and in a particular manner, 'striking."

Petitioner adds: "Is it possible to punch a guy in the butt with a fist, penetrate the cloth of hiS pants and produce an incision? Hardly."

The testimony of the victim, as outlined above, demonstrates that Petitioner hit the victim with his fists after he had initially thrown the victim down on the sidewalk. Such testimony nullifies Petitioner's argument. Assuming arguendo that the evidence on this point was unclear, the charge in the indictment would nonetheless be satisfied. A rational trier of fact could also have concluded beyond a reasonable doubt from the evidence

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that Petitioner picked up the victim and threw him down on the sidewalk, and struck the victim with his hand which caused the victim to fall through a plate glass window. These facts also prove the events alleged in the indictment,

Petitioner's objections to the Findings of Fact and Recommendations on this issue are, therefore, meritless.

B. The Prosecutor's Closing Argument

During closing argument, the prosecutor made the following comments regarding Petitioner's closing statement:

A final argument with unsworn allegations that I cannot cross examine. Talking about a Motion to Dismiss the Indictment that I cannot cross-examine, and that is convenient, but that is not justice. This man (the victim) took the stand and told you what happened to him.
(R. 14 p.34).

I don't know because I didn't hear him say whether or not he tried to give the rock to Mr. Ward. Or whether he went to the grand jury with the rock himself, and was denied testimony. I just don't know.
(R. 14 p.37). The state appellate court reviewing the trial concluded that Petitioner had not preserved his complaint on appeal regarding improper comments on an accused's decision not to testify because he had not obtained a ruling on his objection. For this reason, the Magistrate concluded that Petitioner's appeal on this issue is barred from federal habeas review, and even if it was not barred, the state appellate court determined that Under the "invited argument rule" the prosecutor was Justified in responding to Petitioner's closing argument.

Petitioner objects, arguing that the appellate court's

determination was "dead wrong" and that no objection or ruling was necessary to preserve this error:

The Barajas; court neither knew nor cared what the law was, it relied on misdirection. The magistrate has been careful not to committ himmelf to an indepemndent posture. He does not seem to know what the Texas law on the point is either.

Petitioner goes on to say that "each and every word uttered on defense (sic) closing argument was a fair comment on the evidence" because Petitioner was responding to one of the prosecutorl's own exhibits. The prosecutor's comments were a "devastating... comment to the jury on the [Petitioner's] election not to testify."

The state appellate court ruled that Petitioner had not preserved his objection during the trial. The court, therefore, cannot review his claim except under certain circumstances. Coleman v. Thompson, 501 tl.s. 722, 750 (1991) (" (I] n all cases in which a state petitioner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice,").

Petitioner has not successfully shown that any of these circumstances are present. He claims that the lack of a ruling Incurred because a Texas trial judge cannot be forced to rule if he does not want to and, further, that in this case the trial judge found that the prosecutor's apology was sufficient. The

court has not been cited to, nor has it found, Texas case law or statutes to uupport this argument. The court cannot, therefore, accept this explanation as cause for the default.

Further, Petitioner cannot show actual prejudice an a result of the alleged violation of his federal right not to testify because no violation of his federal right occurred. The Fifth Amendment prohibits a prosecutor from commenting on a defendant's failure to testify. United States v. Dul, 989 F.2d 772, 776 (5th Cir.) . cert. denied, -- U.S. --, 114 S. Ct. 172 (1993). The prosecutor's comments, however, 'must be viewed within the context of the trial in which they are made." Id, (citing United States v. Bright, 630 F.2d 804, 826 (5th Cir.) .

It is well settled that an attorney "may not express his personal opinion concerning the merits of the case." United States v Morris, 568 F.2d 396, 401 (5th Cir. 1978); United States v. Herrera, 531 P.2d 788, 790 (5th Cir. 1976). Additionally, a prosecutor may "comment on the defendants failure to produce evidence on a phase of the defense upon which he seeks to rely." Dula, 989 F.2d at 777 (citing Bright, 630 F-2d at 825). In the context of this trial, the prosecutor "[was] not obliged to sit quietly" while Petitioner made references to his mental state at the time of the incident during his closing argument. Bright, 630 F.2d at 824. Thus, Petitioner's Fifth Amendment right not to testify was not violated by the prosecution's response to those references.

Even if the claim was not barred, there has been no

fundamental miscarriage of justice in this case. The state appellate court concluded that the prosecutor was "justified in commenting upon the Petitioner's unsworn allegations in his closing argument pursuant to the "invited argument rule". Opinion, P. 4. Again, the court reiterates the conclusion of the Magistrate Judge, namely that federal courts' will defer to state courts' Interpretations of their own laws. Dickerson v Guste, 932 F.2d 1142, 1145 (5th Cir.), cert. denied, 502 U.S.

875 (1991); Moreno v. Estelle, 717 F.2d 171, 179 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1904).

Petitioner's objections to the Finding of Fact and Reccomendations on this issue are, therefore, meritless.

C. Misconduct of the Trial Judge and Jury

Petitioner objects that, with regard to this Issue, the Magistrate Judge limited his discuasion solely to the confiscated exhibits. He cites the court to his Appellant Brief and several other documents to note other instances of judicial misconduct that violated his due process right to a fair trial. The court, having made an exhaustive effort to insure a complete record in this case, has reviewed these documents. Petitioner's additional claims of judicial misconduct include claims that the trial judge purgered himself, that he "engaged in conduct which directly benefited the former district attorney," that he joined the prosecutor in a "campaign of abuse against Petitioner" and was openly hostile to the Petitioner. Having reviewed the record, the court finds no evidence to support any of these claims.

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Petitioner also objects to the Magistrate's conclusion that the trial judge's decision to withdraw exhibits from the jury while witnesses were testifying and to make the exhibits available to the jury only when requested was not reversible error. Again, he claims the Magistrate has incorrectly applied the federal law to this issue and not the relevant Texas law. Further, he argues that "Petitioner alone had standing to object to the jury's handling of the exhibits and that once the evidence is in the jury's hands the judge has no right, as opposed to the power, to confiscate it, because the jury is the trier of fact and is supreme in that role under Texas law." He claims that "the jury concluded from the judge's earlier instruction that the exhibits had been ordered atricken."

These objections are similarly meritless. The appellate court found that under state law, the trial court did not commit error either by removing the exhibits or by failing to provide the exhibits to the jury during deliberations. Lopez v. State, 628 S.W.2d 82, 85 (Tex. Cr. App. 1982). The trial judge's decisions involve questions of state procedure. Thus, a federal habeas court is not free to second guess the determination of the state appellate court. Arizona v, Washington, 434 U.S. 497, 511 (1978). This court is not applying federal procedural law, as Petitioner suggests. Rather, it is applying the federal standard of review to a Texas court's determination of Texas procedural law. In any event, the trial judge's instruction clearly indicate that the exhibits were available to the jury upon

request. Petitioner's objections to the Magistrate's finding that no jury misconduct occurred are also meritless, for reasons adequately explained in the Findings of Fact and Recommendations.

D. The Form of the Judgement

Petitioner claims that because the judgment has been reformed by the trial court to remove the words "crime of moral turpitude," he has been confined under a void judgment. According to Petitioner, under Texas law "judgments must conform to verdicts, and nothing may be added or taken away. If anything is added or taken away the judgment is void." Petitioner cites the court to Ex Party Gibson, Smith v State and Moore v. State in support of this argument. 126 S.W.2d 396 (Tex. Cr. App.1939); 234 S.W. 893 (Tex. CR. App. 1921); 203 S.W. 51 (Tex. Cr. App. 1918).

Petitioner's reliance on these cases is misplaced. In Texas, the trial court has the full power and control of its judgments and, in exercising that authority, may correct its judgments during the term at which they were made. Williams v. State,

170 S.N.2d 482, 486 (1943); Shavers v. State, 881 S.W.2d 67, 79 (Tex. App. Dallas 1994, no pet. h.). Similarly, the appellate court can reform the judgment and sentence when the error is not contrary to the verdict. Bogany v. State, 663. S.W.2d 957, 958 (Tex. Cr. App. 1963). While reform of the judgment and sentence cannot be done it there is an unlawful verdict or punishment, that is not the case here. The trial

court was well within its authority to reform this judgment.

Petitioner's remaining objections, disputing the clerical nature of the error, are meritless and were adequately addressed in the Findings of Fact and Recommendations.

E. Pre-trial. :Issues

Petitioner claims that the state failed to conduct a proper investigation, interfered with Petitioner's investigation and deliberately delayed his trial. Patitioner's objections to the Findings of Fact and Recommendation regarding the state's investigation are meritless for reasons adequately addressed in the Magintrate's findings.

Petitioner objects to the Magistrate's conclusion that no prejudice arose as a result of the state's interference with his preparation for trial. Specifically, Petitioner notes the prosecution failed to turn over two of Hill's statements until just before the trial. In his objections, Petitioner argues that meven the knowledge they existed would have altered the entire defense strategy, but more importantly, there would have time to investigate leads that had grown cold and useless by the time they were furnished." Petitioner also claims Hill told him of many instances of his criminal activity, but the prosecutor refused to supplied Petitioner with the records of these crimes.

As the Magistrate noted, delay in providing exculpatory evidence violates Petitioner's rights only when the delay itself causes prejudice. United States v. Patrick, 965 F.2d 13□0,

1400 (6th Cir.), cert. denied, 506 U.S. 940 (1992). Petitioner's

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claim that he would have altered the entire defense strategy does not show prejudice to his defense sufficient to overturn his conviction. Id. Again, Petitioner claims that the Magistrate has applied federal law to this issue where he should have consulted Texas law. Again, the Court points out to Petitioner that it is not applying federal law on this issue, but a federal standard of review to a Texas court's determination of Texas law. As to claims of Hill's criminal convictions, the Magistrate found no factual basis for such claims and the court concurs in that determination.

Petitioner's objections to the Magistrate's Findings of Pact and Reconnendations regarding claims that the state deliberately delayed his trial stem from the Magistrate's alleged miscalculation of a number of factors. Petitioner argues that the delay was twenty-two (22) not twenty (20) months. Further, he argues that he made his speedy trial demand was part of his Motion to Dismiss Indictment in October 1990. The demand the Magistrate alludes to in April 1991 was in fact his second request for a speedy trial. Petitioner also claims that the delay in this case was not his fault, and cites the court to a dialogue he had with the trial judge during a pre-trial motions hearing.

Assuming arguendo that Petitioner's mathematical calculatiorm are correct, he still has not shown a violation of his right to a speedy trial for the reason's outlined by the Magistrate. Further, Petitioner has taken the trial judge's

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comments as to the responsibility for the delay completely out of context. The state appellate court found that there was "some indication that there was a delay due to [Petitioner's]

need to obtain discovery." The court will not disturb this finding.

Petitioner also argues that he did suffer prejudice as a result of the clelay because he did not have leave of the court to depose the witnesses whom he would have Called to testify. The two individuals who died before the trial were defense witnesses who were willing to testify on Petitionerl's behalf. Citing Texas Code of Criminal Procedure, Article 39.02, Petitioner claims that he could not preserve the testimony of these witnesses for trial because, (i)f a witness is willing to talk he cannot be deposed."

The court rejects such an interpretation of the Texas Code of Criminal Procedure. Article 39.02 makes no distinction between witnesses willing and unwilling to talk and the court has not been cited to, nor has it found, any cases making such a distinction. Rather, Petitioner need only file "an affidavit stating the facts necessary to constitute a good reaon for taking the imposition of a wi.tness] . TEX. CRIM PROC. ANN. art. 39.02 (Vernon 1979). Petitioner has not given any other reason why he could not take the desired deposition of his own witnesses.

Finally, Petitioner also argues, without citing to any case, that the Supreme Court has told courts to "bend over backward to avoid finding waiver of constitutional rights.

> " To the Contrary: No procedural principle is more familiar to thi.s Court than that a constitutional right may be forfeited In criminal ...
>
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>
> cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

Coleman-, 501 U..S. at 751 (citing Yakus v United States, 321 U.S 414, 444 (1944)).

Petitioner's objections to the Findings of Fact and Recommendations on this issue are, therefore. meritless.

V. THE RECORD

Compilation of a complete record of this matter has been a subject of uninterrupted and vociferous debate. The controversy over the record and the alleged need to complete the record has been the primary reason for the delay in reaching a final decision in this case. Over the past seven months, the court has attempted to insure that a complete record has been filed with the clerk. The court has now reviewed all of the record, considering only those matters which have evidentiary authenticity. The court believes that the record is now complete and no longer in doubt. From all indications, no important detail of the record remains unfiled. Even then, if either party believes documents should be added to the record for purpoaes of appeal, if any, the party shall bc allowed to supplement the
record in accordance with law within fifteen (15) days from the date of this Order.

VI. CONCLUSION

As required by 28 U.S.C. S 636(b)(1), the court has conducted an independent review of the entire record and a de novo review of the matters raised by the objections. For the reasons set forth above, the court concluded that Petitioner's

objections lack merit, and that they should be overruled. The court further concludes that the Findings of Fact and Recommendations are an accurate statement of the facts and a correct analysis of the law in all regards. Therefore, the court accepts, approves and adopts the Magistrate Judge's factual findings and legal conclusions contained in the Findings of Fact and Recommeddations.

Accordingly, it is ORDFRED that the United States Magistrate Judge Louis Guirola's Findings of Fact and Recommendations are ACCEPTED pursuant to 28 U.S.C. § 636(b) (3.), and that Petitioners claim be DISMISSED WITH PREJUDICE.

It is further ORDERED that, in light of thils decision, Petitioner's Application for Judgment by Default and Motion for Judgment on the Pleadjngs are both DENIED.

It is further ORDERED that all other pending motions are DENIED AS MOOT.

Signed this the 15th day of February, 1995.

s/s ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

NO. 08-91-00403-CR
Appeal from 83rd

District Court of Brewster
County, Texas (TC/ 2733)

JOSEPH DELANEY,Appellant,

V.

THE STATE OF TEXAS, Appellee

JUDGMENT

This cause came on to be heard on the record of the court below, and the same being considered, and it being the opinion of this Court that there was no error in the judgment, it is therefore ordered, adjudged and decreed by the Court that the judgment be in all things affirmed in accordance with the opinion of this Court, that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 13TH DAY OF OCTOBER, 1993.

FILED At 4:00 O'clock P. M, October 19, 1993, District Clerk, Brewster County

s/s Max N. Osborn
Chief Justice, Court of Appeals
for the Eighth District of Texas

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JOSEPH DELANEY, Appellant,

No. 08-91-00403-CR

V.

THE STATE OF TEXAS, Appellee.
Appeal from 83rd District Court of Brewster County, Texas (TC/ 2733)

OPINION

This is an appeal from a jury conviction for the offense of injury to an elderly individual. The court assessed punishment at four years' probation. We affirm.

In Point of Error No. One, the Appellant asserts that during argument, the prosecutor commented on the Appellant's failure to testify. At trial, the Appellant, a lawyer, represented himself p.ro se. The Appellant did not testify during trial. During the State's closing argument, the following exchange occurred:

> STATE: May it please the Court? Counsel? ladies and Gentlemen of the Jury -- as a matter of justice, I sincerely hope that you will never forget that everything said to you in the last thirty minutes is not evidence.
>
> So important, because what we have here is a man defending himself, in making a final argument and giving you unsworn allegations.

A final argument with unsworn allegations that I cannot cross examine. Talking about a Motion to Dismiss the Indictment that I cannot cross examine, and that is convenient; but that is not justice.

This man took the stand and swore an oath and tol d you what happened to him.

DEFENSE: Your Honor, I'm going to object. Uh . . . uh, there's an instruction, uh . . .that deals with my right not to appear on the stand and testify. And I believe that Mr. Woolard's crossed the line on that.

And I would ask the Court to again renew it's instruction.

. . . .

STATE: I apologize, Your Honor, if I made a comment on that right -- I did not mean to. And, I . . . and I certainly will not comment on that.

We note initially that the Appellant did not obtain a ruling on his objection; he has failed to preserve his complaint on appeal. Nastu V. State, 589 S.W.2d 434, 441 (Tex.Crim.App. 1979). The scope of proper jury argument is: (1) summation of the evidence; (2) any reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; and (4) pleas for law enforcement. Whiting v. State, 797 S.W.2d 45, 48 (Tex.Crim.App. 1990). The invited argument rule allows prosecutorial arguments outside the record in response to defense argument which goes outside the record; however, the prosecutor may not stray beyond the invitation. Valenciano v. State,, 705 S.W.2d 339, 342-43 (Tex.App.--San Antonio 1986, pet. refld), cert. denied 484 U.S. 861 1987. The invitation may, in proper

circumstances, include a comment on the accused's failure to testify. Porter v. State, 601 S.W.2d 721, 723 (Tex.Crim-App. 1980), Lopez v. State, 793 S.W.2d 738, 742 (Tex.App.--Austin

1990), dism'd as Improvidently granted, 810 S.W.2d 401 (Tex.Crim.App. 1991).

The facts of the present case focused upon an altercation that occurred on October 31, 1989 between the Appellant and an eighty-five year old physician named Malone Vincent Hill in Alpine, Texas. During the Appellant's closing argument, he made numerous references to his mental state at the time of the incident. He related that with regard to his claim of self-defense:

> I know what's going on in my mind. And it's what's going on in my mind and what I see, what I'm confronted with that's going to determine how much force I use.
>
> And I used what was necessary. I used what it takes. And after that has happened, then I try to leave.
>
> * * * *
>
> I have . . . I have a substantial amount of pity for this man. He is old. He is forgetful. Uh . . he is in poor health. But that's the emotion that I feel when I look him (sic), and I consider his condition, and I think -- well, maybe someday, I'll like that. That doesn't excuse what he did to me, a I'm not gonna . . . I'm not gonna apologize for defending myself against him. His punches hurt. They hurt. They caused me pain.
>
> When I was under attack, I still couldn't find it myself to hurt this man, and I didn't hurt him --ever.
>
> And I never would. I wouldn't hurt him

These assertions are testimonial in nature and are not found

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anywhere in the record.[1] We find that the State was justified in commenting upon the Appellant's unsworn allegations and, as such, we find no error. Point of Error No. one is overruled.

/1 The Appellant asserts that his arguments find support in State's Exhibit No. 9, a motion to dismiss the indictment. However, this document contains various factual allegations none of which provide a factual basis from which the above-mentioned statements can be deduced.

In Point of Error No. Two, the Appellant contends that the court erred in failing to hold an evidentiary hearing on the Appellant's motion for new trial. The Appellant filed his motion for new trial on October 4, 1991. The court denied the motion on the same day. The motion for new trial alleged that the court refused to allow certain exhibits to be published to the jury when Appellant so requested and it further alleged that the failure of the jury to later request the exhibits thereby causing them to not consider all the evidence. There were no affidavits of any jurors attached to the motion for new trial.

Prior to the presentation of the Appellant's evidence and at the close of his opening statement, the court stated:

> Mr. Reporter, uh . . . go ahead and get the exhibits and put lem back here. I'm not gonna allow the Jury to be reading while the testimony is coming in. They'll have plent (sic] of time to go over the exhibits later, sir.

The, Appellant did not object to the court's statement. In the charge, the jury was instructed that:

Upon your written request therefor, any exhibits admitted as evidence in this case will be furnished to you.

The record is devoid of any such request.

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In order for an appellant to have his contention considered attacking the verdict on any matter extrinsic the record itself, as a matter of pleading, he must support it by his own affidavit or the affidavit of someone else specifically showing the truth of the grounds of the attack. McIntire v. State, 698 S.W.2d 652, 658 (Tex.Crim.App. 1985). This pleading must, as a prerequisite to obtain a hearing, sufficiently demonstrate that reasonable grounds exist for believing that jury isconduct occurred, a quotient verdict was agreed upon, or a juror conversed with an unauthorized person regarding the case. Id.

In the present case, we find that the Appellant has not demonstrated that in a matter extrinsic of the record, reasonable grounds exist that jury misconduct occurred. The Appellant provides no authority in support of his contention that the failure of the jury to request the exhibits constituted jury misconduct. Further, it is unclear how these allegations constitute matters extrinsic of the record. TEX.CODE CRIM.PRoc.ANN. art. 36.25 (Vernon 1981) provides that, "There shall be furnished to the jury upon its request any, exhibits admitted as evidence in the case." Trial exhibits are not automatically furnished to the jury. The furnishing of those exhibits to the jury is mandatory in nature only upon the request of the jury. Refusal or failure to allow the jury to have such exhibits is not error unless the jury requests the exhibits. Lopez v. state, 628 S.W.2d 82, 85 (Tex.Crim.App. 1982); Novak v. State, 837 S.W.2d 681, 685

(Tex.App.--Houston [lst Dist.] 1992, pet. refld). We find that

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the court did not abuse its discretion in failing to provide the Appellant a hearing on his motion for new trial. Point of Error No. Two is overruled.

In Point of Error No. Three, the Appellant alleges that the court erred in denying his motion for new trial. The Appellant urges three contentions in support of his contention that a new trial should have been granted. First, he alleges judicial misconduct in having the court reporter take the exhibits from the jury. Second, he alleges jury misconduct in that the jury did not request the exhibits. The Appellant provides no authority for the first proposition and, as stated above, the request for the exhibits is within the province of the jury.

Thirdly, the Appellant contends there was insufficient evidence to support the conviction. A motion for new trial based on the insufficiency of the evidence presents the same legal question that is presented on appeal--that is, whether, viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense charged beyond. a reasonable doubt. State v. Macias, 791 S.W.2d 325, 329-30 (Tex.App.--San Antonio 1990, pet. reffd). This matter will be discussed below. Point of Error No. Three is overruled.

In Point of Error No. Four, the Appellant contends there was insufficient evidence to support the conviction. In reviewing the sufficiency of the evidence to support a criminal conviction, we are constrained to view all the evidence in a light most

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favorable to the verdict to determine whether any rational trier of fact could find the essential elements of the crime as alleged beyond a reasonable doubt. Jackson v. Virginia, 443

U.S. 307, 318-19, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); Geesa v. State, 820 S.W.2d 154, 159 (Tex.Crim.App. 1991); Enriquez v. State, 826 S.W.2d 191 (Tex.App.--El Paso 1992, no pet.). Our role is not to ascertain whether the evidence establishes guilt beyond a reasonable doubt, Stoker v. State, 788 S.W.2d 1, 6 (Tex.Crim.App. 1989), cert. denied, 111 S.Ct. 371 (1990). Nor do we resolve any conflict of fact or assign credibility to the witnesses as it was the function of the trier of fact to accept or reject any, part, or all of any witnesses testimony. See Adelman v. State, 828 S.W.2d 418, 421 (Tex.Crim.App. 1992). Instead, an appellate court's duty is only to determine if both the explicit and implicit findings of the trier of fact are rational by viewing all the evidence admitted at trial in a light most favorable to the verdict. Id. at 421-22. In so doing, any inconsistencies in the evidence are resolved in favor of the verdict. Matson, 819 S.W.2d at 843 quoting Moreno v. State, 755 S.W.2d 866, 867 (Tex.Crim.App. 1988).

At trial, the jury was charged:

> Now if you find from the evidence beyond a reasonable doubt that on or about the 31st day of October, 1989 in Brewster County, Texas, the Defendant, Joseph Delaney, did then and there intentionally and knowingly engage in conduct which did then and there cause bodily injury to Malone Hill, to-wit: by striking him with his fists, and that Malone Hill was then and there an elderly individual who was sixty-five years of age or older, then you will find the defendant guilty of intentionally and knowingly causing bodily injury to

> an elderly individual who is sixty-five years of age or older.

The charge also stated:

By the term 'bodily injury, is meant physical pain, illness, or any impairment of physical condition.

The jury was instructed upon the law of self-defense. Viewing the evidence in the light most favorable to the verdict, the testimony adduced at trial revealed that on October 31, 1989, Dr. Malone Hill was going to buy some candy.

He found a street blocked and drove into an alley and encountered the Appellant walking several dogs on a leash. Hill related that the Appellant then came up to his car and put his hands on the hood and accused Hill of trying to kill him. Hill denied such intent and the Appellant cursed him and challenged him to fight. Hill initially declined this invitation. Hill testified that he tried to back his car in an attempt to leave. He was afraid of the Appellant. The Appellant stayed in front of the car and then got up on the sidewalk and name-called and again invited Hill to fight. Hill testified he picked up a rock to use in possible self-defense figuring that he would hit the Appellant on the jaw or scare him off. Hill left the car and approached the Appellant and he hit Hill on the wrist causing the rock to fall. Hill related that the Appellant then picked him up and threw him on the ground causing the back of his head to hit the pavement. The Appellant then got on top of Hill and hit him in the face several times causing Hill to experience pain. Hill testified that the Appellant got off of him, told him to stand up, and then pushed

the Appellant through a plate glass window. Hill stated that he eceived a cut on the left side of his buttocks. The investigating officer,l Bryan Ward, stated that upon arrival at

the scene, he observed that Hill had a black eye and a cut on his buttocks.

The Appellant maintains that the evidence demonstrates as a matter of law that he acted in self-defense in response to Hill'sattack with a deadly weapon. However, there is some evidencefrom the investigating officer that Hill's use of the rock did not constitute the use of a deadly weapon. There was evidence that Hill was eighty-five years old at the time of the incident.

While there were conflicts in the testimony, it is the jury's province to resolve these conflicts. Viewing the evidence in the light most favorable to the verdict, we find that the jury could conclude that the force the Appellant used against Hill was not immediately necessary to protect himself and such belief that it was necessary was unreasonable See TEX - PENAL CODE ANN. S 9.31(a)(Vernon 1974). Point of Error No. Four is overruled.

In Point of Error No. Five, the Appellant alleges misconduct on the part of the judge and the prosecution resulting in a denial of due process and a fair trial. Prosecutorial misconducd may constitute a denial of due process. This misconduct may implicate a specific provision of the Bill of Rights incorporate into the Fourteenth Amendment by the due process clause, or it may constitute a generic substantive due process violation.

Davis v. State, 780 S.W.2d 945, 949 (Tex.App.--Fort Worth 1989,

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pet. refld). In the latter instance, the reviewing court asks whether the prosecutorial misconduct so infected the trial with unfairness making the resulting conviction a denial of due process. Id. The test to determine whether a trial error made trial fundamentally unfair is whether there is a reasonable probability that the verdict might have been different had the

trial been properly conducted. Id. However, the mere fact that a prosecutor or trial court engages in improper or prejudicial conduct or comments does not automatically render a trialfundamentally unfair. For example, repeated prejudicial statements by the trial court will not result in a denial of due process if all the statements are made outside thepresence of the jury and therefore-do not affect the verdict. Ostos v. State, 713 S.W.2d 402, 403 (Tex.App.--El Paso 1986, pet. refld). Aside from the alleged misconduct of the prosecutor or trial court, the strength of the evidence of guilt and the trial court's attempts to cure any possible mistaken impressions should also be considered in determining whether there is a reasonable possibility that the verdict might have been different. Davis, 780 S.W.2d at 950. The Appellant initially complains of the court's action in denying his motion to dismiss the indictment for prosecutorial misconduct, his motion for speedy trial, and his motions to sanction the prosecution for failure to comply with discovery orders. The Appellant's arguments with regard to the speedy trial motions are discussed below. With regard to the other

motions, the Appellant presents no legal argument regarding the legal impropriety of their denial.

The Appellant asserts that the trial judge engaged in conduct which benefitted the district attorney.[2]

2/ A special prosecutor was appointed to try this case. His first appearance was on August 12, 1991.

This allegation appears to center on the contention that the trial judge allegedly engaged in an ex parte communication with the opposing party in a suit the Appellant filed. This suit was filed to forestall the payment of legal fees to the district attorney in another suit that the Appellant filed to remove the

district and county attorneys. However, it does not appear that this matter came before the jury or affected the verdict.

The Appellant asserts that he was denied due process in that the investigating officer utilized improper investigating procedures. Further, the Appellant contends that the investigating officer failed topreserve some evidence and deliberately concealed some evidence he secured. In support of the first contention, the Appellant cites Ex parte Brandley, 781 S.W.2d 886 (Tex.Crim.App. 1989). In Brandley, the Court of Criminal Appeals held that where the State's investigative procedure is so improper, it may result in a denial of an accused's right to due process of law. Id. at 891. The case was replete with egregious examples of improper and incomplete investigative procedures where the investigating authorities failed to investigate substantive leads and evidence which tended

to exculpate the accused. In the present case, the Appellant complains that the investigating officer, Bryan Ward, failed to secure evidence, find other witnesses to the incident, and make complete report. In particular, the Appellant asserts that the officer failed to observe skid marks from the complainant's vehicle and failed to secure the rock that Hill picked up prior to the incident. However, Ward testified that he saw no other witnesses, did not see the rock and, although he looked, did not see any skidmarks. Given the state of the record, we are unable to conclude that the investigation rose to the level of impropriety contemplated in Brandley.

With regard to the concealment of evidence, the Appellant appears to state that Ward's presentation to the grand jury was based upon an inadequate report in that it failed to make mention of the rock. Of course, this Court will not look behind the actions of the grand jury to determine whether sufficient evidence existed to justify the return of an

indictment. Smith v. State, 708 S.W.2d 518, 521 (Tex.App.--Houston (lst Dist.] 1986, pet. refid), cart. denied, 481 U.S. 1050 (1987). Further an accused does not have the right to be confronted with and to cross-examine witnesses who appear before a grand jury nor does prospective defendant have to be given notice of the grand jury deliberations. Moczygemba v. State, 532 S.W.2d 636, 638 Tex.Crim.App. 1976). As to whether Ward's presentation to the grand jury constituted improper police investigation, we find the allegation too speculative to conclude that it amounted to a

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deprivation of due process.

The Appellant contends that he failed to receive exculpatory material in the form of two statements of the complainant from the prosecution until a week before trial. However, such non-disclosure constitutes error only if its suppression might have affected the outcome of the trial. United States v. Bagley, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985). The material was disclosed prior to trial and we cannot perceive how it affected the outcome of the trial with regard to the examination of the witnesses or other trial considerations.

The Appellant contends that the prosecutor and his assistant escalated and intensified a campaign of abuse against him in that the special prosecutor agreed with the trial judge not to consent to a waiver of a jury trial. Under oath, the special prosecutor denied this allegation thereby presenting a factual determination outside the ambit of this Court's review on appeal. Further, the Appellant states in his brief that these matters came to light in developments subsequent to trial and therefore could not have been before the jury or affected the verdict.

The Appellant asserts that he was denied due process due to prosecutorial misconduct in that he was denied discovery

and the prosecution interfered with his attempts to interview witnesses. With regard to this last allegation, the Appellant refers to an argument before the court at a pretrial hearing where the Appellant stated that these allegations were suspicions on his part. The discovery process appears to have been protracted, but

it appears that the discovery process was completed on the 12th and 13th of Augjust 1991. Again, there is no showing that this matter affected the jury or the verdict.

The Appellant next asserts numerous examples of the trial judge's alleged incompetence. We have examined these allegations and find that none of these alleged inadequacies affected the trial or were before the jury. Point of Error No. Five is overruled.

In Point of Error No. Six, the Appellant alleges that he was denied a speedy trial in violation of the United States Constitution, the Constitution of the State of Texas, and Article 1.05 of the Code of Criminal Procedure. Four criteria govern whether a criminal def endant has been denied the constitutional right to speedy trial: (1) length of delay; (2) reason for delay; (3) assertion of the right; and (4) prejudice to the defendant. Barker v Wingo, 407 U.S. 514, 530, 33 L.Ed.2d 101, 117, 92 S.Ct. 2182 (1972). Here, the Appellant was indicted on January 8, 1990. His right to a speedy trial arose on that date. [3]

3/ Both parties in thir briefs speak of a twenty-two month delay. However, neither party indicates when the speedy trial right commenced and we are unable to determine if the Appellant was arrested prior to his indictment. Chapman v. Evans, 744 S.W.2d 133, 136 (Tex.Crim.App.1988). The Appellant filed a speedy trial demand on April 3, 1991. On July 5, 1991, he filed a motion for discharge based upon his

denial of a speedy trial. On August 12, 1991, a hearing was held on the Appellant's motion for discharge. Trial began on

August 19, 1991. Approximately twenty months elapsed between indictment and trial. Delay in trying a criminal charge must be of sufficient length to create a presumption of prejudice before we reach the renaining Barker factors. Russell v. State, 598 S.W.2d 238,248 (Tex.Crim.App. 1980); Lazcano v. State, 836 S.W.2d 654 (Tex.App.--El Paso 1992, pet. refld). In the present case, there is some indication that there was a delay due to the Appelant's need to obtain discovery. More importantly, the trial was held four months after the Appellant filed his demand for speedy trial. Under these circumstances, we find the delay was not presumptively prejudicial. Point of Error No. Six is overruled.

The judgment of the trial court is affirmed.

October 13, 1993

s/s MAX N. OSBORN, Chief Justice

Before Panel No. 1

Osborn, C.J., Koehler and Larsen, JJ.

(Do Not Publish)

MANDATE

TO THE 83RD DISTRICT COURT OF BREWSTER COUNTY, GREETING:

Before our Court of Appeals for the Eighth District of Texas, on the 13th day of October A.D. 1993, the cause upon appeal to revise or reverse your judgment between

JOSEPH DELANEY, Appellant,
No. 08-91-00403-CR and
THE STATE OF TEXAS, Appellee,

was determined; and therein our said Court made its order in these words:

This cause came on to be heard on the record of the court below, and the same being considered, and it being the opinion of this Court that there was no error in the judgment, it is therefore ordered, adjudged and decreed by the Court that the judgment be in all things affirmed in accordance with the opinion of this Court, that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

WHEREFORE, WE COMMAND YOU to observe the order of our saidCourt of Appeals for the Eighth District of Texas, in this behalf, and in all things have it duly recognized, obeyed and executed.

WITNESS, the HON. RICHARD BARAJAS, Chief Justice of our court of Appeals, with the Seal thereof affixed, at the City of El Paso, -this the 25th day of May, A.D. 1994.
s/s Barbara B. Dorris, Clerk

IN THE 83RD JUDICIAL DISTRICT COURT OF
BREWSTER COUNTY, TEXAS

THE STATE OF TEXAS
VS. NO. 2733
JOSEPH DELANEY

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY COURT--PROBATION GRANTED

JUDGE PRESIDING: ALEX R. GONZALEZ -
JUDGMENT DATE: OCTOBER 4, 1991

SPECIAL PROSECUTOR: STEVEN L. WOOLARD
ATTORNEY FOR DEFENDANT: JOSEPH DELANEY, PRO SE

OFFENSE CONVICTED OF: INJURY TO THE ELDERLY
DEGREE: THIRD OFFENSE DATE: OCTOBER 31, 1989

CHARGING INSTRUMENT: INDICTMENT PLEA: NOT GUILTY

JURY VERDICT: GUILTY

PRESIDING JUROR: TIMOTHY BONE

PLEA TO ENHANCEMENT FINDINGS ON ENHANCEMENT
PARAGRAPH(S): N/A PARAGRAPH(S): N/A

FINDINGS ON USE OF DEADLY WEAPON: N/A

PUNISHMENT ASSESSED BY: JUDGE ALEX R. GONZALEZ

DATE SENTENCE IMPOSED: OCTOBER 4, 1991

PUNISHMENT:

PLACE OF CONFINEMENT: INSTITUTIONAL DIVISION, TEXAS DEPARTMENT OF CRIMINAL JUSTICE

DATE TO COMMENCE: OCTOBER 4, 1991

TIME CREDITED: 1 DAY TOTAL AMOUNT-OF RESTITUTION/ REPARATION:

RESTITUTION TO BE PAID TO:

NAME: MALONE V. HILL
ADDRESS: 123 N. SIXTH STREET
ALPINE, TEXAS 79830

JUDGMENT OF CONVICTION

On the 19th day of August, 1991, this cause was called for trial, and the State appeared by STEVEN L. WOOLARD, Special Prosecutor, and the Defendant, JOSEPH DELANEY, having been duty arraigned, appeared in person, in open Court, pro se, as an attorney licensed to practice Law in the State of Texas, and both parties announced ready for trial; thereupon a jury of good and lawful men and women, to-wit Timothy Bone and eleven others, was duty selected, impaneled and sworn, according to Law; the indictment was read, and the Defendant entered his plea of "NOT GUILTY"

thereto, and the evidence for the State and Defendant was submitted and concluded, and the Court charged the jury as to the Law applicable to said cause, and argument of counsel for
PAGE 1
the State and the Defendant was duty heard and concluded, and the jury retired in charge of the proper Officer to consider their verdict; and afterwards was brought into Court by the proper Officer, the Defendant and his counsel being present, and in due form of Law returned into open Court on the 21st day of August, 1991, the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

VERDICT

We, the Jury, find the Defendant, JOSEPH DELANEY, guilty of Injury to the Eldery, a third degree felony.

s/s TIMOTHY BONE
PRESIDING JUROR

Prior to commencing the case the said Defendant in open Court requested that his punishment be assessed by the Court, and the Court proceeded to the punishment phase of the treat. The evidence submitted for the State and for the Defendant was duty heard, and at the conclusion of such evidence, argument of counsel for the State and for the Defendant was duty heard and concluded, and the Court thereupon fixed the Defendant's punishment by payment of a fine in the amount of $___, and confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of 4 years.

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendant, JOSEPH DELANEY, is guilty of the offense of Injury to the Eldery, a crime of moral turpitude, which offense occurred on the 31st day of October, 1989, and

that he be punished by confinement in the Institution at Division of the Texas Department of Criminat Justice for a term of 4 years, and a fine assessed in the amount of $___, and that the State of Texas do have and recover of the said Defendant alt costs in this prosecution expended, for which Let execution issue;

PROBATED SENTENCE

And thereupon the Defendant was asked by the Court whether he/she had anything to say why sentence should not be pronounced against him/her and the Defendant answered nothing in bar thereof. Whereupon the Court Proceeded, in the presence of said defendant to pronounce sentence against Defendant; and the Court after due consideration is of the opinion, and so finds, that the ends of justice and the best interests of both the pubtic and the Defendant will be served if the imposition of sentence in this cause be suspended and the Defendant be ptaced on probation under the supervision of the Court.

IT IS THEREFORE ORDERED by the Court that the imposition of the sentence in this cause be,and the same is hereby suspended during the good behavior of the Defendant, and the said Defendant be and is hereby placed on probation for a term of 4 years, beginning on this date under the supervision of the Court and the duly appointed and acting AduLt Probation Officer of the 83rd Judicial District of this County, subject to the following conditions of probation; that during the term of probation the Defendant shall:

(1) Obey all orders of the Court and the Probation Officer; (2) Commit no offense against the laws of this or any other State or of the United States; (3) Avoid injurious or vicious habits, including the use of narcotics or habit forming drugs and alcoholic beverages; further, without medical prescription, not to own, use, sell or distribute, or have under control any

PAGE 2

"controlled substance or dangerous drug" as defined by the "Controtted Substance Act" and/or "Dangerous Drug Act" as passed or amended by the Texas Legislature; (4) Avoid persons or places of disreputable or harmful character, including not frequenting or going to places where intoxicating beverages are sold excluding bona fide eating establishments; and not associate or communicate with any person known to have a criminal record or is otherwise known to have a reputation; (5) Report in person to the Probation Officer monthly on or before the 10th day of each succeeding and successive month hereafter; or in such manner and times as directed hereafter in writing by the Probation Officer, and promptly reply to any communication from the Probation Officer; (6) Permit the Probation officer to visit you at your home or elsewhere; (7) Work faithfully at suitable employment; (8) Report any change of address or employment to the Probation officer within 2 working days; (9) Remain within the county in which this action is pending, excepting temporary absences due to employment (not to exceed 24 hours), untess given permission to leave by the Probation Officer; (10) Support your dependents, should you have any dependents; (11) At all times conduct yourself in an honorable manner as a good member of the community and not endanger in any way the person, property, rights, dignity or morals of yourself or others; (12) Not possess or exercise control over any type of firearm, i.e., rifte, pistol, shotgun, etc., whether in public or in private, during said term of probation, without the prior written consent of your probation officer; (13) Report any arrests of Probationer herein, including traffic violations and regardless of disposition thereof, to the Probation Officer within 10 days of said arrest;

MONEY ASSESSMENTS

(14) Pay to the Probation officer an administrative fee of $40.00 each month, hereinafter referred to as "Probation Fees", beginning on the 10th day of each month following the month inwhich this order is signed betow, until this term of probation is terminated;

(15) Pay to the Probation officer, who shail pay the same over to the District CLerk, all Court Costs in this cause as follows:

(a) Reimbursement for attorneys fees paid by the County in which the offense occurred to the Court-Appointed Special Prosecutor in this cause in the sum of $___.

(b) All other Court costs in the sum $84.50)

(16) Pay to the Probation Officer, who shall pay the same over to the District Cterk, the fine assessed by the Court in the sum of $35.00

(17) Pay to the Probation Officer, who shall pay the same over to the victim(s) of the Defendant's crime, as restitution and reparation thereof in the sum of $__.

TOTAL OF MONEY ASSESSMENTS (excluding monthly Probation Fees): $__.

SPECIAL CONDITIONS OF PROBATION

ONLY THE FOLLOWING ITEMS, NUMBERED 18-22, WHICH ARE INITIALED BY THE JUDGE, ARE TO BE INCLUDED AS

A CONDITION OF PROBATION:

(18) Voluntarily and forthwith submit to urine or other tests for the purpose of checking for drug or alcohol traces as directed by the Probation Officer, authorizing the attending physician to release same to said ProbatiQn Officer, and to pay all costs incurred in said testing to the physician and/or Probation Department; (not initialed)

(19) Be at your place of residence every night between 12:00 midnight and 6:00 a.m. the

following morning, and remain there unless working in the employment that you have previously advised the Probation Officer; if ANY exception is needed, you shall first obtain and keep in your possession, written permission from the Probation Officer;
(not initialed)

(20) Participate in the foLLowing community service work as directed by the Probation Officer, for:
Ist degree fetony-more than 320 hours but tess than 1000 hours
2nd degree fetony-more than 240 hours but tess than 800 hours
3rd degree fetony-more than 160 hours but tess than 600 hours
to wit:____ hours. (not initialed)

(21) The Defendant is ORDERED to the___County Community Corrections Facility for not tess than 3 months nor more than 1 year until released by the Court to ordinary probation supervision and is to secure employment and obey all rules and regulations of and to make a payments as required by said Rehabititation Center. The Court finds the defendant is employable, did not use a deadly weapon, did not commit bodily or serious bodity fniury or cause death in this offense; (not initialed)

_____ (22) Other:

_____

_

IT IS ORDERED that the money assessments hereinabove ordered shall be paid by the Defendant according to the foltowing schedule:

$____ on or before the 10th day of each month next following the the month of the signing and entering hereof, as shown below and a like amount on or before the 10th day of each month thereafter until such sums, except unaccured

Probation fees have been paid in full; provided, however, that if the amount required to pay the balance due on the aggregate of all such money assessments, except unaccured Probation fees, is less than the amount of a regular monthly payment as set forth in this paragraph, then the last such payment shall be accordingly reduced. Thereafter, the Defendant shall pay the Probation Fee each month on or before the 10th day of each month until the Defendant's Probation is terminated. (not initialed)

IT IS FURTHER ORDERED that all sums of money paid by or for the Defendant on account of the money assessments hereinabove imposed on the Defendant, regardless of to whom such sums are paid, shall be applied first to pay the fees for collecting and processing checks or other similar sight orders, if any such fees have been assessed hereinabove, until paid in full. Next to pay monthly Probation Fees, both for the month in which paid and for att the months for which such monthly Probation Fees shall then be in arrears, if any. Next, to pay the Court Costs until the Court costs are paid in full. Next pay the fine, if any, assessed as punishment herein, until the fine is paid in full. And Last, to pay restitution and reparation, if any has been assessed hereinabove, until paid in full. If the Court shall hereafter revoke the defendant's Probation, IT IS ORDERED that the money assessments imposed herein, or any part thereof may be collected by any person authorized by Law to collect or case the collection thereof.

You are hereby advised that under the Laws of this State, the Court shall determine the terms and conditions of your probation, and may at any time during the period of probation, without hearing, modify the conditions of your probation. The Court also has the authority at

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any time during the period of your probation to revoke your probation for violation of any of the conditions set out above.

SIGNED on October 4, 1991

s/sAlex R. Gonzales
Judge Presiding

Defendant's Left
index Finger

_____
Defendant's Left
Index Finger

On this the 4th day of October, 1991, the defendant, Joseph Delaney, refused to submit a fingerprint sample for identification purposes.
s/s Wanda Gunn, Witness s/s Daniel Kaase, Witness

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No. 2733

THE STATE OF TEXAS x IN THE DISTRICT COURT
vs. x 83RD JUDICIAL DISTRICT
JOSEPH DELANEY x BREWSTER COUNTY, TEXAS

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JOANN SALGADO
District Clerk

BREWSTER COUNTY
P.O. DRAWER 119 / ALPINE. TEXAS 79831
915-837-3366

TRIAL COURT CAUSE NUMBER 2733
No. 08-91-00403-CR

THE STATE OF TEXAS IN THE DISTRICT COURT

vs. 83RD JUDICIAL DISTRICT

JOSEPH DELANEY BREWSTER COUNTY. TEXAS

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IN THE 83RD JUDICIAL DISTRICT COURT
OF
BREWSTER COUNTY, TEXAS

STATE OF TEXAS

VS. NO. 2733

JOSEPH H. DELANEY

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

The Defendant, JOSEPH R. DEIANEY, stands charged by indictment with Injury To An Elderly Individual, alleged to have been committed on or about the 31st day of October, 1989, in Brewster County, Texas. The Defendant has pleaded not guilty. I now charge you with the law applicable in this case.

1.

Our law provides that a person commits an offense if he intentionally or knowingly, by act or omission, engages in conduct that causes bodily injuiry to an elderly individual who is sixty-five (65) years of age or older.

2.

By the term "bodily injury" is meant physical pain, illness, or any impairment of physical condition.

"Conduct" means an act br omission and its acompanying mental state.

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"A person acts intentionally, or with intent, with

respect to a result of his conduct when it is his conscious objective or desire to cause the result."

"A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

3.

Now if you find from the evidence beyond a reasonable doubt that on or about the 31st day of October, 1989 in Brewster County, Texas, the Defendant, Joseph Delaney, did then and there intentionally and knowingly engage in conduct which did then and there cause bodily injury to Malone Hill, to-wit: by striking him with his fists, and that Malone Hill was then and there an elderly individual who was sixty-five years of age or older, then you will find the defendant guilty of intentionally and knowingly causing bodily injury to an elderly individual who is sixty-five years of age or older.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the Defendant of intentionally and knowingly engaging in conduct that caused bodily injury to Malone Hill.

4 .

Upon the law of self defense, you are instructed that a person is justified in using force against another when and to the degree he reasonably believes the force is immediately neces-sary to protect himself against the other person's use or attempted use of unlawful force.

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When a person is attacked, or an attempt is made to attack such person, with unlawful force, and there is created in the mind of such person a reasonable expectation of fear of some bodily injury, then the law excuses or justifies such person in resorting to force to the degree that he reasonably believes is immediately necessary, viewed from his

standpoint at the time, to protect himself from attack or attempted attack.

A person is under no obligation to retreat to avoid the necessity of repelling or defending, with force less than deadly force, against an attack or attempted attack.

By the term 'deadly force' as used herein, is meant force that is intended or known by the person using it to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

Now, if you find and believe from the evidence beyond a reasonable doubt that on the occasion in question the Defendant did beat with his fists on the complainant, Malone Hill, but you further find from the evidence, or you have reasonable doubt there- of, that at that time the Defendant was under attack or attempted attack from the complainant, Malone Hill, and that the Defendant reasonably believed, as viewed from his standpoint, that such force as he used was immediately necessary to protect himself against such attack or attempted attack, and so believing, he beat with:. his fists the complainant, Malone Hill, and that such force was not deadly force used by the Defendant, then you will acquit the Defendant and say by your verdict not guilty.

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5 .

If you find from the evidence beyond a reasonable doubt that at the time and place in question the Defendant did not reasonably believe that the degree of force actually used by him was immediately necessary to protect himself against Malone Hill's use or attempted use of unlawful force, if any, as viewed from Defendant's standpoint, at the time, then you must find against the Defendant on the issue of self defense.

6.

Our law provides that a Defendant may testify in his own behalf if he elects to do so. This, however, is a privilege

accorded a Defendant, and in the event he elects not to testify, the fact cannot be taken as a circumstance against him.

7.

A grand jury indictment is the means whereby a Defen- dant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the issue of guilt of the Defendant. The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the Defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each and every element of the offense is proved beyond a reasonable doubt. The fact that a Defendant has been arrested, confined, or indicted for, or other- wise charged with the offense gives rise to no inference of guilt at the trial. In case you have a reasonable doubt as to a

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Defendant's guilt after considering all the evidence before you, you will acquit him.

You are instructed that neither arguments nor state- ments of counsel for the State or counsel for the Defendant is evidence. In your deliberations, you must not relate to your fellow jurors any personal experience of your own, nor shall you relate any occurrence, happening, or event known to you and not shown by the evidence of this case. And you shall not speculate on, nor concern yourselves with, matters not shown by the evidence in this case and about which you are not called upon to make any decisions. In all your deliberations, you will confine yourselves strictly to the evidence introduced before you in this trial under the rulings of the Court and the definitions and in- structions given to you by the Court. If any member of the jury attempts to violate these instructions, the other members shall stop him or her at

once. If the juror persists in the violations, the Presiding Juror shall immediately report that fact to the Court in writing.

You are instructed that you are not to allow yourselves to be influenced in any degree whatsoever by what you may think or surmise the opinion of the Court to be. The Court has no right by any word or act to indicate any opinion respecting any matter of fact involved in this case, nor to indicate any desire respecting its outcome. The Court has not intended to express any opinion upon any matter of fact in this case. If you have

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observed anything which you have or may interpret as the Court's opinion upon any matter of fact in this case, you must wholly disregard it.

8.

Do not let bias, prejudice or sympathy play any part in your deliberations.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given their testimony, but I, and I alone, shall advise you of the law in the form of these written instructions, and you are governed thereby.

9.

After you retire to the jury room, you should select one of your members as your Presiding Juror. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto, and sign-ing the same as Presiding Juror.

Once you begin your deliberations, no one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention

any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

10.

During your deliberations, you may communicate with this Court, but only in writing, through the officer who has you

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in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the Court, or anyone else concerning any question you may have. Af ter you have reached a unanimous verdict, the Presiding Juror will certify thereto by filling in the appropriate form attached to this charge and signing his or her name as Presiding Juror.

You will not decide your verdict by lot or by drawing straws or by any other method of chance, nor shall you compromise your verdict in any manner.

You shall have this written charge with you when you go to the jury room to deliberate.

Upon your written request therefor, any exhibits admitted as evidence in this case will be furnished to you.

Suitable forms for your verdict are hereto attached. Your sole duty at this time is to determine the guilt or innocence of the Defendant under the indictment in this cause. You are to restrict your deliberations solely to the issue of guilt or innocence of the Defendant.

You may now retire to consider your verdict.

SIGNED AND ENTERED this 22nd day of August, 1991,
at 10:00 A.M.

s/s Alex R. Gonzalez
Judge Presiding

IN THE 83RD JUDICIAL DISTRICT COURT
OF
BREWSTER COUNTY, TEXAS

STATE OF TEXAS
VS.
JOSEPH H. DELANEY

NO. 2733

VERDICT

We, the Jury, find the Defendant, JOSEPH DELANEY, not guilty, of Injury To An Elderly Individual.

PRESIDING JUROR

STATE OF TEXAS
VS.
JOSEPH H. DELANEY

NO. 2733

VERDICT

We, the Jury, find the Defendant, JOSEPH DELANEY, guilty of Injury To An Elderly Individual, a felony of the third degree, as charged in the indictment.

U. S. Constitution, Amendment 5
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment 6
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Constitution, Amendment XIV, Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nordeny to any person within its jurisdiction the equal protection of the laws.

Supreme Court Rule 10

Rule 10. Considerations Governing Review on Writ of Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

•(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; •(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; •(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

28 U.S.C §1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Public Law 104, Section 103, amending Supreme Court Rule 22(b) and Title 28, Section 2254 U.S.C.

(b) CERTIFICATE OF APPEALABILITY

In a habeas corpus petition in which the detention complained of arises out of process issued by a state court, the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of Title 28, United States Code. If an appeal is taken by the applicant the district judge who rendered the judgmentshall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of apeal and the file of the proceedings in the district court. If the district judge has denied the certificate the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of appealability is not required.

Vernon's Annotated Texas Penal Code, Section 1.03 (a)

Offenses

Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order

of a county commissioners court, or rule authorized by and lawfully adopted under a statute.

Vernon's Annotated Texas Penal Code, Section 107 (A) (11) (b)

Deadly weapon - defined

A deadly weapon is anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Vernon's Annotated Texas Penal Code, Section 1.07 (a) (22)

Elements - defined

"Element of Offense means":

(A) the forbidden conduct

(B) the required culpability

(C) any required result

(D) the negation of any exception to the conduct

Vernon's Annotated Texas Penal Code, Section 9.01

Deadly force- defined

In this chapter:

(3) "Deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

Vernon's Annotated Texas Penal Code, Section 9.31

Self-Defense

(a) Except as provided in subsection (b) of this section, a person is justified in using force against another when and to the degree he reasonably believes that the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

(b) The use of force against another is not justified:

1) In response to a verbal provocation alone:

2) To resist an arrest or search that the actor knows is being made by a peace officer, or a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful, unless the resistance is justified under subsection (c) of this section.

3) If the actor consented to the exact force used or attempted by the other: or

4) If the actor provoked the other's use or attempted use of unlawful force, unless:

(A) The actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter: and

(B) The other nevertheless continues to use unlawful force against the actor.

(c) (Section (c) relates to arrest and search only].

Vernon's Annotated Texas Penal Code, Section 9.32

Deadly Force In Defense Of The Person

A person is justified in using deadly force against another:

1) if he would be justified in using force against the other under Section 9.31 of this code;

2) if a reasonable person in the actor's situation would not have retreated; and

3) when and to the degree he reasonably believes the deadly force is immediately necessary:

(A) to protect himself against the other's use or attempted use of unlawful deadly force, or

(B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Vernon's Annotated Texas Penal Code, Section 15.01

Attempts - defined

(a) A person commits an offense if, with specific intent to commit an offense he Does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

(b) If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if the element that aggravates the offense accompanies the attempt.

(c) It is no defense to prosecution for criminal attempt that the offense was actually committed.

(d) An offense under this section is one category lower than the offense attempted* and if the offense attempted is a felony of the third degree, the offense is a class A misdemeanor.

* *(If the offense attempted is murder, a first degree felony, then the attempt is a felony of the second degree).*

Vernon's Annotated Texas Penal Code, Section 19.01

Homicide - defined

(a) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual.

(b) Criminal homicide is murder, capital murder, voluntary manslaughter, involuntary manslaughter, or criminally negligent homicide.

Vernon's Annotated Texas Penal Code, Section 19.02

Murder - defined

(a) A person commits an offense if he:

1) Intentionally or knowingly causes the death of an individual:

2) Intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual: or,

3) [This section deals with homicide committed during the course of another felony].

(b) An offense under this section is a felony of the first degree.

Vernon's Annotated Texas Penal Code, Section 22.01

Simple assault - defined

(a) A person commits an offense if the person:

1) intentionally, knowingly, causes bodily to another, including the person's spouse, or;

2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse, or;

3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under Subsection (a) (1) is a Class A Misdemeanor unless: (Exceptions do not apply).

(c) An offense committed under Subsection (a) (2) is a Class C Misdemeanor unless (Exceptions do not apply).

(d) An offense committed under Subsection (a) (3) is a Class C Misdemeanor unless - (Exceptions do not apply).

Vernon's Annotated Texas Penal Code, Section 22.02 (a) (4)

Aggravated Assault, by Deadly Weapon - defined

(a) A person commits an offense if the person commits an assault as defined under Section 22.01 of this code and the person:

4) uses a deadly weapon.

Vernon's Annotated Texas Penal Code 22.04 (a)

Injury To Child, etc. - defined

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or invalid individual:

(1) serious bodily injury;

(2) serious physical or mental deficiency or impairment;

(3) disfigurement or deformity; or,

(4) bodily injury.

Vernon's Annotated Texas Code Of Criminal Procedure, Article 38.08

Defendants' election not to testify

Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor the same be alluded to or commented upon by counsel in the cause.

Vernon's Annotated Texas Code Of Criminal Procedure, Article 39.02

Depositions For Defendant

Depositions of witnesses may be taken by the Defendant. When a defendant desires to take the deposition of a witness he shall, by himself or counsel, file with the clerk of the court in which the case is pending, an affidavit stating the facts necessary to constitute a good reason for taking the same. Provided that upon the filing of such application, and after notice to the attorney for the state, the courts shall hear the application and determine if good reason exists for taking the deposition. Such determination shall be based on the facts

made known at the hearing, and the court, in its judgment, shall grant or deny the application on such facts.

Vernon's Annotated Texas Rules Of Criminal Evidence, Rule 602

Lack Of Personal knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Vernon's Annotated Texas Rules Of Criminal Evidence, Rule 801 (d)

Definition of Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Vernon's Annotated Texas Rules Of Appellate Procedure, Rule 30(b)(2), (8), & (9)

Grounds For New Trial

(b) A new trial shall be granted an accused for the following reasons:

(2) Where the court has misdirected the jury as to the law or has committed some other material error calculated to injure the rights of the accused.

(8) Where the court finds that the jury has engaged in such misconduct that the accused has not received a fair and impartial trial.

(9) Where the verdict is contrary to the law and the evidence.